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No. 96-1829

In The

Supreme Court of the United States

October Term, 1997

STATE OF MONTANA; MARY BRYSON;
BIG HORN COUNTY; and MARTHA FLETCHER,

Petitioners,

v.

CROW TRIBE OF INDIANS; and
UNITED STATES OF AMERICA,

Respondents.

JOINT APPENDIX
VOLUME II, PAGES 211 TO 418

JOSEPH P. MAZUREK
Attorney General
CLAY R. SMITH*
Solicitor
State of Montana
215 North Sanders
P.O. Box 201401
Helena, MT 59620-1401
(406) 444-2026

CARTER G. PHILLIPS
PAUL E. KALB
C. FREDERICK BECKNER
SIDLEY & AUSTIN
1722 Eye Street, N.W.
Washington, D.C. 20006
(202) 736-8000

*Counsel of Record
for Petitioners*

ROBERT S. PELCYGER
FREDERICKS, PELCYGER,
HESTER & WHITE, LLC
1881 9th Street, Suite 216
Boulder, CO 80302
(303) 443-1683

*Counsel of Record
for Respondent
Crow Tribe of Indians*

SETH WAXMAN
Solicitor General
LOIS J. SCHIFFER
Assistant Attorney General
JAMES C. KILBOURNE
EDWARD J. SHAWAKER
ELIZABETH A. PETERSON
Attorneys
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217
*Counsel for Respondent
United States of America*

Additional Counsel on Inside Cover

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Christine A. Cooke
Big Horn County
Attorney
Drawer H
Hardin, MT 59034
(406) 665-2255

James E. Torske
314 North Custer Avenue
P.O. Drawer F
Hardin, MT 59034
(406) 665-1902

Additional Counsel for Petitioners Big Horn County and Martha Fletcher

Majel Russell
Crow Tribal Attorney
Crow Tribal Legal
Department
303 North Broadway,
Suite 616
Billings, MT 59101
(406) 259-8611

Additional Counsel for Respondent Crow Tribe of Indians

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LIST OF DOCUMENTS CONTAINED IN APPENDIX TO PETITION

The following opinions, orders, pleadings and statutes appear in the Appendix to the Petition for Writ of Certiorari at the indicated pages and therefore have been omitted from the Joint Appendix:

LIST OF DOCUMENTS CONTAINED IN APPENDIX TO PETITION – Continued

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
BILLINGS DIVISION

THE CROW TRIBE OF INDIANS,	)	
Plaintiff,	)	CV-78-110-blg
-vs-	)	ORDER
THE STATE OF MONTANA, et al.,	)	(Filed Jan. 6, 1983)
Defendants,	)	
and	)	
WESTMORELAND RESOURCES, INC.,	)	
Defendant-Intervenor.	)	

This Court, having considered the briefs of the parties and oral argument held on December 30, 1982, rules as follows:

IT IS ORDERED that plaintiff's motion, pursuant to Rule 67, Fed.R.Civ.P.,to deposit the total Montana coal severance tax payments of Westmoreland Resources, Inc., for coal mining on the ceded strip outside the Crow Reservation, into the registry of the Court until the final resolution of this action, is granted. Payments into this Court shall be deposited on the schedule and in the amounts determined by Montana law for payment of the severence tax, and shall be deposited into an insured interest-bearing account.

IT IS FURTHER ORDERED that plaintiff's motion for a preliminary injunction enjoining defendants State of Montana and Montana Director of Revenue, their agents, employees, and attorneys from taking any action to enforce or collect the Montana coal severance tax from defendant Westmoreland Resources, Inc., or to penalize Westmoreland Resources for failure to pay the tax directly to the state, to the extent that the tax is imposed on coal produced from coal deposits on the ceded strip, is granted, provided that amounts claimed by Montana as taxes are deposited with the Court by Westmoreland Resources, Inc., as directed above.

Jurisdiction lies in this Court by 28 U.S.C. § 1362. Jurisdiction is not barred by 28 U.S.C. § 1341. *Moe v. Confederated Salish & Kootenai Tribes*, 425 U.S. 463 (1976). That the Crow Tribe [Tribe] has standing to challenge the state severance tax may be implied from the Ninth Circuit Court of Appeals decision that the Tribe's claim stated a cause of action. *Crow Tribe of Indians v. State of Montana*, 650 F.2d 1104 (9th Cir. 1981). Further, the lease agreement between the Tribe and Westmoreland Resources, Inc. [Westmoreland] (requiring Westmoreland to pay the Tribe an amount equal to the Montana severance tax, but not more in total severance tax payments to Montana and the Tribe, than the Montana severance tax) surely gives the Tribe a direct monetary interest in the validity of the severance tax because Westmoreland need not pay Tribal severance tax if Westmoreland pays the Montana severance tax.

The dispute between the Tribe and Montana over the moneys paid by Westmoreland as a severance tax on Indian-owned, off-reservation coal is an appropriate case

for deposit into the Court of the moneys over which ownership is disputed. Rule 67, Fed.R.Civ.P. *See Moore's Federal Practice*, ¶ 67.0, *et seq*. The certainty of the amount and the established payment schedule simplify logistical difficulties that might be associated with such a large sum of money, estimated to be $2,600,000 per quarter.

This Court grants a preliminary injunction to prevent the State of Montana from attempting to collect a coal severance tax from Westmoreland for coal mined on the ceded strip, and to prevent any possible penalty imposed upon Westmoreland for failure to pay the tax money directly to the State. The test that this Court must apply in determining whether preliminary injunction should be granted is set out in *William Inglis & Sons Baking Co. v. ITT Continental Baking Co.*, 526 F.2d 86 (9th Cir. 1975). This Court will issue a preliminary injunction when, "serious questions are raised and the balance of hardships tips sharply in [plaintiff's] favor." *Id.* at 88. The Tribe has met this burden. Serious questions as to Montana's right to tax an Indian-owned, off-Reservation mineral development are addressed in this suit; serious harm may come to the Tribe if the tax moneys paid by Westmoreland to the State are never made available to the Tribe. (As noted by the Ninth Circuit Court in *Crow*, the Tribe is apparently not entitled to any refund of taxes previously paid by Westmoreland to Montana if the Montana tax statutes are declared invalid. *Id.* at n. 13, 1113.) On the Montana side of the balancing equation, the amount of tax money to be deposited, and the lesser amount available for the general fund (50% of the total tax) are a fractional percentage of the Montana state budget. Further, the shortfall to the State can be met by an appropriation of the

necessary amount from the 50% Constitutional trust fund. This Court is aware that a three-fourths vote of the Legislature is necessary to "liberate" those funds; however, if the money is required by the State, it is available to the State – no such mitigating opportunity is available to the Tribe. On the other hand, the Tribe remains heavily in debt. (*See* Affidavits of Gale Loomis and Donald A. Stewart, Sr.) Of course, while the money is deposited with the Court, it will be unavailable to the Tribe; but if the Tribe should prevail, the money will help to solve the debt problem of the Crow Tribe.

As noted by the Ninth Circuit in *Inglis, supra*, it is not necessary that the moving party be reasonably certain to succeed on the merits; if the harm that may occur to the plaintiff is sufficiently serious, it is only necessary that there be a fair chance of success on the merits. *Inglis*, at 88. This Court's reading of the Ninth Circuit decision in *Crow* holds that decision to read that if the facts are as alleged by the Tribe, and the balance of interests of the Tribe outweigh the state's, and the off-reservation nature. of the coal is somehow mitigated, then the Tribe may prevail. No findings of fact or weighing of balance tests were done by the Circuit, or by this Court in its prior consideration of this matter. However, in the opinion of this Court, the Tribe has met its burden to show that there is a fair chance that it will succeed on the merits.

If Montana ultimately prevails, the deposited funds plus interest will be turned over to the State and tax collection will proceed as it has in the past. If the Tribe prevails, the funds deposited with the Court are the Tribe's and, as such, the moneys would belong to them. Without the deposit to the Court, a victory by the Tribe

on the merits would not give it the tax moneys paid by Westmoreland to Montana prior to entry of the hypothetical victorious judgment. *Crow* at 1113. A deposit of tax moneys into the Court would remedy this inequity simply and effectively.

If this Court is to preserve its power to render a meaningful decision – giving the tax moneys to their rightful owner after a trial on the merits – the deposit of tax moneys into the Courts and the concomitent [sic] injunction against the State is essential.

The Clerk is directed forthwith to notify counsel for the respective parties of the making of this order.

Done and dated this 6th day of January, 1983.

/s/ James A. Battin
Chief United States
District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
BILLINGS DIVISION

THE CROW TRIBE OF INDIANS, et al, Plaintiffs,	)	
vs.	)	
UNITED STATES OF AMERICA, et al, Plaintiff-Intervenor,	)	No. CV-78-110-BLG
vs.	)	
STATE OF MONTANA: ELLEN FEAVER, Director, Montana Department of Revenue; BIG HORN COUNTY, Montana; YELLOWSTONE COUNTY, Montana; TREASURE COUNTY, Montana; LORRAIN HAMILTON, Treasurer, Big Horn County, Montana; MAY JENKINS, Treasurer, Yellowstone County, Montana; CLARIBEL BONINE, Treasurer, Treasure County, Montana, Defendants.	)	Volume I
WESTMORELAND RESOURCES, INC. Defendant-Intervenor.	)	

TRANSCRIPT OF PROCEEDINGS

The above-entitled matter came on for trial in open court before the HONORABLE JAMES F. BATTIN, United States District Court Judge, on Monday, January 9, 1984, commencing at approximately 9:00 a.m.

* * *

[p. 55] Q [By Steven E. Carroll] Are you aware of whether the Crow Tribe has enacted a tax ordinance on coal?

A [By Wyman P. Babby] The Tribe enacted a coal tax in 1976.

[p. 56] Q Are any taxes being collected under that Act on the Westmoreland lease?

A None.

Q Why is that?

A The arrangements that the Tribe has entered into with Westmoreland, provides that the company would receive credit for those tax burdens that it carries that must be paid to the State. Now, the tribal tax is set at a 25 percent level. The effect of the taxes, as I understand them, at the moment, that Westmoreland must comply with with the State, is at approximately 25 percent.

Q Has the Secretary approved the imposition of the gross severance tax on the Westmoreland coal?

A No, and that is a particular problem that the tribal government has attempted to address on a number of occasions over these last few years.

Q What is the nature of the problem?

A The problem is occasioned by the fact that the Tribe in its constitution has disclaimed jurisdiction outside the boundaries of the reservation, and the Secretary has indicated that that is an impediment to his being able to approve the tax ordinance until such time as it is corrected.

[p. 716] IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
BILLINGS DIVISION

THE CROW TRIBE OF INDIANS, et al, Plaintiffs,)	
vs.)	
UNITED STATES OF AMERICA, et al, Plaintiff-Intervenor,)	No. CV-78-110-BLG
vs.)	
STATE OF MONTANA: ELLEN FEAVER, Director, Montana Department of Revenue; BIG HORN COUNTY, Montana; YELLOWSTONE COUNTY, Montana; TREASURE COUNTY, Montana; LORRAIN HAMILTON, Treasurer, Big Horn County, Montana; MAY JENKINS, Treasurer, Yellowstone County, Montana; CLARIBEL BONINE, Treasurer, Treasure County, Montana, Defendants.)	Volume V
WESTMORELAND RESOURCES, INC. Defendant-Intervenor.)	

TRANSCRIPT OF PROCEEDINGS

Trial resume [sic] in the above-entitled matter in open court before the HONORABLE JAMES F. BATTIN, United States District Court Judge, on Friday, January 13, 1984, commencing at approximately 9:00 a.m.

* * *

[p. 765] Q [By John W. Ross] With regard to the Tribe's tax, is that a constitutional provision; in other words, is the Tribal tax provision in the Constitution of the Crow Tribe?

A [By Patrick Stands Over Bull] Yes, it is.

Q And can you tell me when it was voted upon as a constitutional enactment?

A It was included in the Constitution from the time the Constitution was developed back in the late 40's, but the Constitution never specified what type of taxes until 1976, January, that we amended the Constitution to include the 25 percent severance tax.

Q And who drafted that 25 percent severance tax?

A That was the Tribal attorneys at the time.

Q And are you aware of whether or not Senator Tom Towe of Montana has assisted the Tribe at all in the drafting of its severance tax?

A I don't recall.

Q Do you know whether or not the Tribe's severance tax provides credits against the tax for any other taxes or royalties?

A I believe that was the reason why we set up our [p. 766] office of research to develop these, which we don't have at the time, and they were to develop the figures and so forth, which I am not too familiar to be –

Q So you are not really sure whether or not the way the tax is calculated –

A The 25 percent was to go under – the figure come up by the State of Montana. So by imposing that 25, we would be able to have a better opportunity and give it the opportunity to negotiate with the coal company.

Q But you are not really certain whether the way the tax is actually calculated, whether or not it would be more or less than 25 percent; is that right?

A Could you restate that please? I am not aware of –

Q You are not aware of the actual calculation of the tax would result in a tax, say, of more than 25 percent?

A Not to the extent of specific figures, no, I am not.

Q And are you aware that the tax that's referred to in the Westmoreland 1982 agreement would provide for a tax of the same magnitude as the State of Montana tax?

A You said 1982.

Q Are you aware that there is an agreement between Westmoreland and the Crow Tribe that was entered into in 1982 that provides that if the Crow Tribe wins this case, [p. 767] they'll get a tax payment that's of the same magnitude of the State's tax? Are you aware of that?

A I am aware of it, but I wasn't involved in the negotiation.

Q And you are aware, aren't you, that the Tribe's constitutional severance tax has not yet been approved as it would apply on the ceded area?

A Yes, I am.

Q Are you aware that the Secretary of Interior has issued guidelines for the development of Tribal severance taxes?

A Yes, I am aware of it.

Q And are you aware that those guidelines require that before a severance – an Indian severance tax is enacted that notice should be given 30 days in advance to the public?

A I –

Q Would you like me to repeat the question?

A Would you, please?

Q Are you aware that those guidelines issued by the Department of Interior require that prior to adopting a Tribal severance tax, that notice should be given in newspapers and that sort of thing to the public advising them that the Tribe is considering a severance tax?

A Yes, yes, I am aware of that.

Q And are you aware that the Secretary is not [p. 768] supposed to approve a severance tax unless these notice requirements have been followed?

A Yes.

Q Prior to the adoption of the Tribe's constitutional severance tax, was notice given to the general public and an opportunity for, say, the coal companies to come in and express their views on that tax?

A I believe we did as part of the procedures – any time you want to amend the constitution, we follow the proper procedures.

Q Did any coal companies actually come in and make any statements or provide any testimony prior to the adoption of the Crow Tribe's constitutional severance tax?

A They have expressed their concern at the time, but I don't recall the specific meeting.

Q But you are not aware that they actually appeared at any hearing and expressed their views; is that right?

A I can't recall.

Q Isn't it true that the Secretary has indicated that he will not approve the Crow severance tax on the ceded area until there is a change in the Crow's constitution? Are you aware of that?

A I believe so, yes.

* * *

[p. 772] <u>REDIRECT EXAMINATION</u>

Q. [By Robert S. Pelcyger] And then finally, would you like to clarify or correct the testimony that you gave concerning the Tribal severance tax that was enacted in 1976?

[p. 773]A Yes. 1976, I stated there was a constitutional amendment, however, I was mistaken. I recall it was an ordinance that was passed in 1976.

Q Do you recall what constitutional provision was involved in that whole process of severance tax issue?

A The constitutional provision never relates to severance tax in the Constitution. It was – the Constitution just was a general tax, never specified a severance tax, and this is why we came up with an ordinance to impose a severance tax in '76.

Q Was there a problem so far as the tax was permissible under the Constitution as applied to the ceded area?

A Excuse me. Would you say that again?

Q Was there a problem under the Constitution as to whether the Tribe had the authority to impose a severance tax on the minerals in the ceded area?

A That's right.

* * *

JEROME ANDERSON
JOHN W. ROSS
Anderson, Brown, Gerbase,
Cebull & Jones, P.C.
315 North 24th Street
P. O. Drawer 849
Billings, Montana 59103-0849

CHRIS D. TWEETEN
Assistant Attorney General
State of Montana
Justice Building
215 North Sanders
Helena, Montana 59620
Telephone: (406) 444-2026

JIM CARLSON
Attorney,
Treasure County
P. O. Box 72
Hysham, Montana 59038

JIM SEYKORA
Attorney,
Big Horn County
Hardin, Montana 59034

ATTORNEYS FOR DEFENDANTS,
THE STATE OF MONTANA

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF MONTANA

BILLINGS DIVISION

THE CROW TRIBE OF INDIANS, Plaintiffs, and UNITED STATES OF AMERICA, Plaintiff-Intervenor, -v- THE STATE OF MONTANA, Defendants, and WESTMORELAND RESOURCES, Defendant-Intervenor.	NO. CV-78-110-BLG **DEFENDANTS' MEMORANDUM IN OPPOSITION TO MOTIONS FOR PRELIMINARY INJUNCTION AND LEAVE TO DEPOSIT FUNDS INTO COURT**

I.

INTRODUCTION

The Motions presently before the Court seek to have the Court Order that all of Westmoreland's gross proceeds tax payments due in the future and commencing with the May 31, 1984 payment on coal produced on the ceded area, under lease from the Crow Tribe, be deposited into Court pending the outcome of this litigation. In January, 1983, in response to Motions filed jointly by the Crow Tribe and Westmoreland Resources in November of 1982, this Court entered its Order directing Westmoreland to pay its coal severance tax payments into the Court and enjoined the State from taking action to collect the severance tax pending the outcome of this case. The 1982 Motions explicitly did not seek relief regarding Westmoreland's gross proceeds tax payments. Now, some sixteen months after this Court's actions regarding the severance tax payments, the Tribe, the United States, and Westmoreland, are once again asking the Court to interfere with the orderly collection of State taxes by seeking similar relief from Westmoreland's obligation to pay gross proceeds taxes to Big Horn County.

There are numerous reasons why the Motions before the Court should be denied. In order to more fully understand some of these reasons against deposit of Westmoreland gross proceeds payments to Big Horn County into Court at this time, it may be useful to present a general explanation of the gross proceeds tax as it relates to the method of establishing "taxable valuations" and the County budget and expenditure process.

Therefore, this Memorandum will first generally review the gross proceeds tax, and the County budget and expenditure process. Second, this Memorandum will review some of the previous arguments against deposit of Westmoreland's severance tax payment, particularly as they relate now to the gross proceeds tax. Third, this Memorandum will present arguments against deposit of the gross proceeds tax at this time, based on the established tests for a preliminary injunction, which tests which tests involve an inquiry into the probable success on the merits, the possibility of irreparable injury or serious questions being raised, the adequacy of available remedies to the parties, and involve a balancing of interests and potential injury to the Plaintiff, the Defendants, and the public generally. These tests must be considered with some understanding of the gross proceeds tax and the County budget and expenditure process, which is no simple matter, which, in itself, is one reason why a Court should be reluctant to interfere with the orderly working of that process, and not further complicate such process.

II.

EXPLANATION OF GROSS PROCEEDS TAX AND COUNTY BUDGET AND EXPENDITURE PROCESS

To understand the disruption and difficulties that would be encountered by Big Horn County and other political entities as a result of the deposit of Westmoreland's gross proceeds tax, it is necessary to understand Montana's County budget process and the method of establishing and collecting property taxes.

The taxation and collection of the gross proceeds taxes are part of the property tax system. The value of gross proceeds from the sale of coal is included in the total "taxable valuation" for the County and the value of the gross proceeds is taxed at the general County mill rate.

The basic County budget process is set forth at §7-6-2301, M.C.A., et seq. It requires that on June 1 of each year, the County Clerk and Recorder notify each County official and that each County official, by June 10, submit a detailed estimate of reserves and expenditures for their office for the next year. The County Commissioners, pursuant to §7-6-2311, M.C.A., must prepare a budget statement showing all new road and bridge construction, together with the costs of construction. The Clerk and Recorder then tabulates and classifies these estimates of income and expenditures from the various county offices and County Commissioners. A preliminary budget is then prepared. The Commissioners then determine how much money is estimated to be received from all sources, including taxes, and the Commissioners then determine, pursuant to §7-6-2318 and §7-6-2319, M.C.A., how much money is estimated to be received from all sources, including taxes, and determine how much must be raised by a tax levy. The final budget is then adopted after notice and hearing, and the tax level is established on the second Monday of August, pursuant to §7-6-2321, M.C.A. The Department of Revenue certifies to the County, the "taxable valuation", which includes the gross proceeds of a coal mine. This County budget system is designed to produce a balanced budget. The Commissioners take the expenditure requirement estimates,

determine the non-tax revenue estimates, and then set a tax levy to make up the difference to provide a balanced budget. The tax levy is figured by taking the revenue requirements and dividing them into "taxable valuation" to yield a mill rate.

Taxes for a fiscal year, which runs from July 1 to June 30, are raised by this mill rate. The first half taxes are to be paid by November 30, and the second half taxes by June 1 of the following year.

The collection of the May 31 payment generally funds expenditures which have already been made or committed to be made. The local entities sometimes can try to shift around, to the extent allowed, cash from all sources in anticipation of receipt of these May 31 tax payments. Counties and school districts are legally prohibited, under §7-6-2325, M.C.A., from making transfers between funds, and within a fund only limited transfers may be made. It is impossible to shift funds from relatively less important services to absolutely essential services. The net effect of a deposit of Westmoreland's May 31, 1984 gross proceeds tax payment with the court, is that the County funds necessary for County and school operations in the current fiscal year will be unavailable. There is no realistic procedure by which to avoid serious disruption to County government and school districts, in the event Westmoreland gross proceeds tax, particularly its May 31, 1984 payment, is deposited with the Court. Only if the Court were to order the Department of Revenue to reduce the County and school districts "taxable valuation" by the amount of Westmoreland's gross proceeds tax payment, and permit the County to recalculate the mill levy on this new reduced "taxable valuation" (up

to the legal maximum), and reissue the tax assessments with new higher tax rates, and collect additional taxes, would the County raise necessary funds to meet expenditures which have already been made or will be made in June of this fiscal year, which ends July 1, 1984.

Because of the schedule of the budgeting and tax collection process of the County, an interruption of a gross proceeds tax payment to be paid on May 31 is the worst time for the County for such an interruption of payment. And this timing problem is compounded in the present situation in Big Horn County, as evidenced by the attached Affidavits of Big Horn County and school officials, because Westmoreland's gross proceeds payment makes up a substantial portion of the County's tax revenues, and because many of the budgets have already been expended in anticipation of receipt of the May 31 tax payments. Moreover, there is no speedy or adequate remedy available to the County to make up this shortfall that would occur if Westmoreland's May 31, 1984 payment is withheld. It is important to keep in mind that the tax rate is dependent upon total "taxable valuation", which includes the gross proceeds value as its single largest part. If the County is not going to receive money from Westmoreland gross proceeds, then such gross proceeds should not be in the "taxable valuation" and the mill rate would have to be substantially higher to raise the money required to operate government. But because the Westmoreland's gross proceeds were considered part of the "taxable valuation" of the County for the current fiscal year, the County budget and expenditures have been made in reliance upon receipt of Westmoreland's May 31 payment. Moreover, the County, under State statute, must

continue to treat Westmoreland's gross proceeds as part of the County's "taxable valuation", unless an Order from this Court could somehow rule otherwise. The only other feasible alternative would be for the County to greatly inflate their budgets based upon Westmoreland's gross proceeds being part of the "taxable valuation" and if they did not in fact receive Westmoreland's payment their overinflated budget would be enough to at least meet essential services. But, of course, all of this would take time and be no solution to the immediate shortfalls in the current year ending June 30, 1984, in the event that Westmoreland's May 31, 1984 payment is put in escrow. Obviously the County budget and taxation process is not one that could readily, quickly, or easily adjust to the escrowing of a tax payment, particularly one that is due on May 31, which is late in the County's fiscal year.

The attached Affidavits of various officials of Big Horn County further illustrate the disruption and difficulties that would be encountered by Big Horn County and Big Horn County schools in the event that Westmoreland's May 31 gross proceeds tax payment is deposited in escrow.

III.

REVIEW OF PREVIOUS ARGUMENTS AGAINST A PRELIMINARY INJUNCTION AND DEPOSIT OF FUNDS, PARTICULARLY AS THEY APPLY TO THE CURRENT REQUEST FOR AN INJUNCTION AND DEPOSIT OF THE GROSS PROCEEDS TAX

All of the Defendants' arguments previously asserted in opposition to the Crow Tribe and Westmoreland's

Motions for Preliminary Injunction and Deposit of Westmoreland's severance tax, Defendants still believe are relevant in objection to the present Motions. However there are now reasons why those arguments are more persuasive as they relate to the present request to deposit Westmoreland's gross proceeds tax.

The Defendants argued in opposition to the Tribe and Westmoreland's November, 1982 Motions, with regard to the severance tax, that neither the Tribe nor Westmoreland had standing to seek the requested relief. Defendants again contend that neither the Tribe nor Westmoreland have standing to seek the relief requested by the present Motions. Westmoreland is the taxpayer, but its Motion is clearly barred by 28 U.S.C. §1341. The Tax Injunction Act, 28 U.S.C. §1341, provides that:

> District Courts shall not enjoin, suspend, or restrain the assessment, levy or collection of any tax under State law where a plain, speedy, and efficient remedy may be had in Courts of such state.

Defendants recognize that § 1341 does not bar an action by the Tribe in certain cases brought under 28 U.S.C. §1362. *Moe v. Confederated Salish and Kootenai Tribes*, 425 US. 463, 470-75 (1976). However, in *Moe*, the challenged tax was paid by tribal members. Here, in contrast, the tax is paid by Westmoreland, a non-Indian corporation. Nothing in *Moe* suggests that an Indian Tribe has standing to sue under 28 U.S.C. §1362 to enjoin the collection of taxes from a non-Indian. And, although the United States has now intervened since the November, 1982 Motions, and has joined in the present Motions, Defendants submit that the United States has no greater claim

to standing than the Tribe or Westmoreland. Like the Tribe, the United States is not the taxpayer. The Tribe is not the taxpayer, and its claims to Westmoreland's tax payments are tenuous at best. The record from the trial in this case clearly shows that the Tribe does not have a gross proceeds tax, which has been approved by the Secretary of the Interior, under which the Tribe could apply and collect a gross proceeds tax on the ceded area, even in the absence of the County's gross proceeds tax. Recognizing that neither the Tribe nor Westmoreland could individually seek relief, the movants have contrived a lease amendment which purports to assign to the Tribe, an interest in Westmoreland's gross proceeds tax and Westmoreland's status as a taxpayer. Defendants submit that such an agreement cannot assign an interest in Westmoreland's tax, particularly retroactively in the absence of a valid, functioning gross proceeds tax of the Tribe. The defendants submit that movants cannot create jurisdiction in this Court by such agreement with each other. Since the Tribe seeks to assert remedies available only to Westmoreland, and Westmoreland, in turn, must rely on the Tribe's rights to avoid the bar of §1341[1], Defendants submit that neither the Tribe, the United States, or Westmoreland, has standing to invoke the jurisdiction of this Court under the present Motions.

---

[1] It is plain that Westmoreland's claim for relief in this case is based on its assertion of the rights of others, namely, the Crow Tribe. Westmoreland has never asserted that the taxes it challenges here violate Westmoreland's legal rights and it, therefore, should not be entitled to relief. *Warth v. Seldin*, 422 U.S. 490, 509 (1975).

The plain, statutory language of the Tax Injunction Act generally prohibits Federal District Courts from interfering with the collection and disbursement of State taxes. And it is important to consider the policy behind this Tax Injunction Act because Defendants submit that it is particularly relevant in this situation, and should be controlling despite 28 U.S.C. §1362. This policy of leaving the States, and their political subdivisions, such as Big Horn County and the Big Horn County school system, free to collect their taxes without undue interference from the Federal Courts, has been enunciated in numerous Court cases, including the recent case of *Assiniboine Sioux and Sioux Tribes v. State of Montana*, 568 F. Supp. 269 (1983). In the *Assiniboine and Sioux Tribes* case, the Court stated at p. 279:

> "The individual plaintiffs have attempted to persuade this Court that their claims somehow evade the restrictions of the Tax Injunction Act. In rejecting the invitation to expand the obviously limited jurisdiction of this Court, the necessity that state and local governments be permitted to assess and collect taxes with a minimum of federal interference weighs heavily on this court's mind. See, *Perez v. Ledesma*, 401 U.S. 82, 127-129 n.17, 91 S.Ct.674, 698-699 n.17, 27 L.Ed.2d 701 (Brennan, J. concurring and dissenting). This is especially true in this age where local governments, and indeed governments at all levels, face fiscal ruination at every turn."

See also *Dillon v. Montana*, 634 F.2d 463, 466 9th Cir.(1980); *Mandel v. Hutchinson*, 336 F.Supp. 772, 779 (C.D. Cal. 1971), Aff'd. 494 F.2d 364, 366 (9th Cir. 1974). Defendants

submit that his policy of allowing States and their political subdivisions to collect their taxes without undue interference from the Federal Courts, is particularly poignant in this case, in view of the fact that the gross proceeds tax and its collection and disbursement is so complicated, and any disruption of it, particularly at this time, would create particular problems for the State and its local subdivisions.

The policies enunciated in 28 U.S.C. § 1341, which provide that a District Court should not enjoin a tax under State law where a plain, speedy and efficient remedy may be had in State Court, is particularly applicable here where Westmoreland has adequate remedies to challenge the gross proceeds tax. Montana law provides a speedy and adequate remedy to the taxpayer Westmoreland to challenge the gross proceeds tax, or recover its payment in the event that the gross proceeds tax is declared invalid. The provisions for protest under State law, are designed to provide an adequate and speedy remedy, not only for the taxpayer, but makes it easier for the State and local government to operate and adjust than does a deposit under Rule 67 of the F.R. Civ. P. However, Westmoreland, rather than choosing to pay the gross proceeds under protest and file an action in State Court, has apparently chosen to support the present Motions, which, as noted, because they come so late and seek to interrupt the final payment in the current fiscal year, which is almost over with, the difficulties and chaos that a deposit by this Court would create, causes more severe problems to the governmental entities. As noted in the general explanation of the County's budget revenue and

the expenditure process noted at the outset of this memorandum, under Rule 67 of the F. R. Civ. P. if Westmoreland's tax payment is deposited, it would still be considered part of the County's "taxable value", upon which the budget process would be structured. This means that the County would or has budgeted as if the County would receive Westmoreland's tax payment, but, in reality, the County would simply not have the funds to meet expenditures already made or needed to be made. If the Court were to disregard the policy behind the Tax Injunction Act and allow an interruption of the complicated County tax process with a deposit into Court of Westmoreland's gross proceeds tax, it would be tantamount or necessary for the Court to Order that contrary to State law, Westmoreland's gross proceeds tax should not be included in the "taxable value" of the County in order for the County to readjust its taxation and budget process and raise additional revenues to meet necessary expenditures. Obviously, the gross proceeds tax and the County budget and expenditure process presents greater logistic difficulties than the severance tax payment to the governmental entities involved. Unlike this Court's conclusion on page 3 of its January 6, 1983, Order, depositing the severance tax, the timing, payment schedule, and process involved with the gross proceeds tax does present logistic difficulties. And not only would the logistic difficulties be incurred upon an Order depositing the gross proceeds tax in escrow, but such logistic difficulties would be compounded, in the event that the Court were subsequently to find that the gross proceeds tax is valid, and the County would be faced with somehow refunding

amounts they may have collected to compensate for any amount previously deposited in Court.

Finally, the movants ask that the gross proceeds tax payments "due in the future", pending outcome of this case, be deposited. It is unclear to the Defendants how Westmoreland calculated the present gross proceeds tax attributable to coal mined under lease from the Crow Tribe on the ceded area, and not mined under lease with the State on the State section. It is also unclear how that amount may be determined in the future if the County had to change its taxable valuation as a result of the Court's Order to deposit Westmoreland's gross proceeds tax. This raises a further question of whether the amount sought to be deposited is really an amount certain as required under Rule 67 of the Federal Rules of Civil Procedure.

IV.

TESTS THIS COURT MUST APPLY IN DETERMINING WHETHER A PRELIMINARY INJUNCTION SHOULD BE GRANTED

As a practical matter, a deposit of the gross proceeds tax in Court, pursuant to Rule 67, has the same effect as an injunction and, therefore, the factors considered in determining whether an injunction should be issued are also relevant to the Motion under Rule 67. There are basically two tests which have been laid out by the Courts in determining whether a preliminary injunction should be granted. This Court, in *Kelly v. Gilbert*, 437 F. Supp. 210, 204 (D. Mont. 1976), set forth four requirements:

(1) A reasonable probability of success on the merits;

(2) Irreparable injury for which there is no adequate legal remedy;

(3) Others will not suffer serious adverse affects as a consequence of the preliminary injunction;

(4) ***The effect of the requested Order on the public interest.

An alternative test, which this Court previously followed, was enunciated in *William Inglis & Sons Baking Company v. ITT Continental Baking Company*, 526 F.2d 86 (9th Cir. 1975). The Court in the *William Inglis & Sons Baking Company* case stated:

> "One moving for a preliminary injunction assumes the burden of demonstrating either a combination of probable success and the possibilities of irreparable injury or serious questions are raised and the balance of hardships tip sharply in his favor."

In applying these tests to the Motions now before the Court and the factual situation presented by the possibility of a deposit of Westmoreland's May 31, 1984, gross proceeds tax payment, it is clear that that movants do not meet the requirements under these tests for a deposit or a preliminary injunction. The defendants submit that the Tribe has plainly fallen far short of its burden of proof regarding the gross proceeds tax.

The Defendants submit, without waiving any of their past or future arguments with regard to the severance tax

and without going into the detail that will be in Defendant's trial Brief that there are several reasons and significant differences between the deposit of the severance tax in January of 1973, and the current request to deposit the gross proceeds tax. These reasons and differences help make it more difficult for the movants here to show even a fair chance of success on the merits or that there are serious questions raised, and more difficult for the movants to show that the balance of hardships are tipped sharply in their favor.

It may be helpful to briefly review some of the previous statements of the 9th Circuit and this Court in this case, and then note some of the differences presented by the present situation and the gross proceeds tax. Even the decision of the 9th Circuit remanding this case with much dicta, suggests that there is a difference in the gross proceeds tax and the severance tax. As noted by the 9th Circuit at 650 F.2d 1115:

> "As for the gross proceeds from coal tax, the record is insufficient at this stage of the proceedings to reveal what State, Tribal, and Federal interests may be involved or indicate whether the taxes impact is sufficient to thwart the policies of the 1938 Act."

The decision of the 9th Circuit in this case also stated that the Tribe must show that the taxes *substantially* affect its ability to offer governmental services and to show that the tax is unreasonable. *Crow Tribe v. State of Montana*, 650 F.2d 1115-1116 (1981).

This Court, in its January 6, 1983, Order, stated that under the 9th Circuit's opinion,

> "If the facts are as alleged by the Tribe, *and* the balance of interests of the Tribe outweigh the State, *and* the off-reservation nature of the coal is somehow mitigated, then the Tribe may prevail." *Order* at Page 4 (emphasis added).

If the 9th Circuit believed that the record as to the gross proceeds tax was insufficient before trial to indicate whether the gross proceeds tax thwarted the policies of the 1938 Act, clearly the record after trial shows the gross proceeds tax has little impact, and is in fact a reasonable tax on the part of the County.

There is no evidence that the gross proceeds tax, has had any depressant effect whatsoever on tribal revenues or the Tribe's ability to market coal. The gross proceeds tax, as a percentage of the delivered price of coal, is minuscule. Dr. Dunbar's testimony, at Page 584-87 of the Transcript, like all of the Tribe's expert economic testimony, is clearly hypothetical. It suggests only that if the Tribe levies a tax at a rate so as to maximize its revenues, the gross proceeds tax would be an impediment. This speculation is not proof of the impact of the gross proceeds tax because the Tribe's authority to tax Westmoreland at *any rate* has not been approved by the Department of Interior, and because there is no evidence that the Tribe would be likely to legislate in the manner suggested by Dr. Dunbar if the Department would approve. There is no evidence in the record to suggest that in the absence of the County's gross proceeds tax, the Tribe would have imposed their own gross proceeds tax on Westmoreland or received any additional revenue from Westmoreland in the absence of the State's taxes. Even under the dicta enumerated by the 9th Circuit in this case, there should

be no serious question as to the validity of the gross proceeds tax.

The more serious questions raised by the prospect of a deposit of the gross proceeds tax, are those questions raised regarding the difficulties and inequities resulting to the County as a result of the requested deposit. As will be shown more fully in the Defendants' Trial Brief, the "particularized inquiry" into the State, Federal and Tribal interests at stake in regard to Westmoreland's mine will clearly show that the balance favors the State. Finally, the Tribe has completely failed in its burden of "mitigating the off-reservation nature of the coal".

In considering whether the Court should deposit the gross proceeds tax in light of these previous statements of the 9th Circuit and this Court, some of the differences presented by the request to deposit the gross proceeds tax at this time, and the request to deposit the severance tax in November, 1982 should be noted.

First, the amount of the gross proceeds tax to be deposited now is approximately $715,000.00, compared to quarterly severance tax payments of approximately $2.6 million. Assuming that his Court may possibility [sic] make its decision in this case in the fall of 1984, it could mean that this one gross proceeds tax payment of $715,000.00 would be the only gross proceeds tax involved, whereas, since January of 1983, there may be seven severance tax payments involved, which, at approximately $2.5 million per payment, equals $17.5 million, compared to $715,000.00

Second, all of the gross proceeds tax is used in the County, unlike the severance tax.

Third, the gross proceeds tax makes up a substantial portion of the County budget, unlike the severance tax which is a much smaller percentage of the State budget, as noted on page 3 of this Court's January 6, 1983 Order regarding the severance tax.

Fourth, as noted above, the County budget process has already been set and it included, and is relying upon receipt of, Westmoreland's May 31, 1984 gross proceeds tax, unlike the State which did not include Westmoreland's severance tax payments in preparation of the State's budget in early 1983. And as noted above, and evidenced in the attached memorandums, the Counties have in fact already spent, or are committed to spend, the money, which includes Westmoreland's May 31, 1984 tax payment.

While Defendants believe that on this record there is no serious question as to the validity of the gross proceeds tax, Defendants also submit that the present Motions fail on the second prong of the test enunciated in *Inglis*, and the test enunciated in *Kelley v. Gilbert*, *supra*, which involve the balancing of hardships to the Plaintiffs, Defendants, and the public.

The movant's arguments regarding the balance of hardships are more smoke than substance. The basic premise of the movant's argument to deposit the gross proceeds tax at this time is that the Court must intervene to create a fund from which the gross proceeds taxes may be refunded in the event the tax is invalidated. Movants assert that the tax payments are "difficult or perhaps impossible to trace". This is simply false. Montana law

provides any number of remedies under which a taxpayer may recover an illegally collected tax. The primary remedy available is to pay the tax under protest.[2] Section 15-1-402, M.C.A., allows a taxpayer to pay disputed tax under protest, and following exhaustion of administrative remedies, to sue to a refund in State Court if necessary. Contrary to the movants' assertion, these funds are not "difficult or perhaps impossible to trace." Given the availability of this and other State remedies[3], the movants' assertion that intervention by this Court is necessary to prevent substantial hardship to the movants rings false. Moreover, if the movants were to follow these procedures provided by State law, Defendants submit that the difficulties, inconveniences, and time involved would be less that deposit of the gross proceeds tax under the Motions here.

On the other hand, the hardships to the County and the citizens of Big Horn County are substantial, if the gross proceeds tax, particularly the payment due by June

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[2] Westmoreland is intimately familiar with this process. As a Plaintiff in *Commonwealth Edison v. Montana* 453 U.S. 609 (1981), Westmoreland paid its severance tax under protest during the pendency of that litigation to achieve precisely the results sought in the present motion. Westmoreland, at least, can hardly be heard to assert that there is no other adequate remedy.

[3] Section 15-1-406, M.C.A., allows the taxpayer to file a declaratory action as to an alternative to the administrative remedy for protest payments. Section 15-16-601, M.C.A., provides a further administrative remedy under which the taxpayer may file a claim with the County Commissioners for referral of taxes illegally collected by the County within ten years after the taxes are paid.

1, 1984, is deposited in Court at this time, the problems and hardships are substantial.

Again, one must look at some of the basic facts in order to proceed to balance the hardships of the parties. First, the gross proceeds tax is used entirely in Big Horn County, unlike the severance tax, and has and will benefit Westmoreland, Indians and Non-Indians in the County. The population trend of Big Horn County indicates that the population in Big Horn County increasingly Indian and currently is approximately 50% Indian and 50% non-Indian. Second, the gross proceeds tax makes up a substantial part of the County's budget, unlike the fractional percentage of the severance tax to Montana's State budget, as noted on Page 3 of this Court's January 6, 1983, Order to deposit the severance tax. Westmoreland's gross proceeds tax is used for numerous and various services in Big Horn County, and, as noted in the attached Affidavits of Big Horn County officials, Westmoreland's gross proceeds tax makes up a large percentage of the revenues for these services. Third, the record in this case clearly demonstrated that the County and State provide almost entirely all past, present, and future services on the ceded area. With some of these facts in mind, a discussion of the balance of hardships presented by a possible deposit of the gross proceeds tax at his [sic] time, shows that the equities tip sharply in favor of the Defendants.

As noted at the outset, there is in place a fairly complicated and orderly procedure for counties to budget for services and proceed to collect revenues to provide those services. And that county budget process starts on or before June 1 of each year with the county officials estimating their expenditures for the forthcoming fiscal

year. The budget is subsequently set based on these June estimates, and expenditures throughout the fiscal year, which runs from July 1 to the end of June, proceeds, based upon that budget and revenue expectations. A copy of a county budget calendar outlining this process is part of the Affidavit of Joyce Lippert attached hereto and made a part hereof. What this means is that Big Horn County, beginning in June of 1983, proceeded to project their expenditures and revenue receipts and they did so on the basis that the gross proceeds tax payments from Westmoreland's mine on the ceded area would make up a large part of the revenues to provide those services in the fiscal year running from July 1, 1983, through June 30, 1984. And, the officials of Big Horn County have proceeded to make expenditures on the basis that they would be receiving the second half payment from Westmoreland in May of 1984. What this means is that the movants' Motion at his [sic] time to have Westmoreland's gross proceeds tax payment, starting with its second payment due May 31, 1984, into escrow could not have come at a worse time. As noted in the attached Affidavits of Big Horn County officials, much of the money, including Westmoreland's gross proceeds tax payment is due on or before May 31, 1983, has already, in fact, been spent. And, typically, there are other substantial expenditures of the County and County schools, which are scheduled in June of 1984. As noted in the attached Affidavit of Roberta Snively, and Rod Svee, the impact on schools in Big Horn County, which would result if the May 31, 1984, gross proceeds tax payment of Westmoreland is deposited, are particularly severe.

As suggested in the general explanation of the budget and revenue process of Big Horn County at the outset of this Memorandum, the remedies to the County try to soften the blow of having Westmoreland's gross proceeds tax payment deposited at this time, are very limited. Not only has much of that money already been spent, but there are statutory restrictions on the County's ability to transfer money from other funds to meet those expenditures. And, as explained in the Affidavit of Joyce Lippert, attached hereto and made a part hereof, the County's reserves also do not provide an adequate answer to the problems that would be presented if the County does not timely receive Westmoreland's May 31, 1984, gross proceeds tax payment.

As also noted at the outset of this Memorandum, the County tax system is based on a concept of "taxable valuation" and Westmoreland's gross proceeds tax, was considered as part of the "taxable valuation" of Big Horn County, when the County prepared its County budget for its fiscal year which ends June 30, 1984. Westmoreland's gross proceeds tax will continue to be considered part of Big Horn County's "taxable valuation", even if Westmoreland's gross proceeds tax is deposited into escrow. Unless an Order from this Court ordering a deposit of Westmoreland's gross proceeds tax in Court, would somehow override the Montana Statute providing that the Westmoreland "gross proceeds" are part of the "taxable valuation" of Big Horn County, could Big Horn County then proceed to try to raise revenues on a realistic "taxable valuation" of Big Horn County.

If Big Horn County does not receive Westmoreland's gross proceeds tax, Big Horn County would somehow

have to increase the millage rates to receive greater revenues in order to meet the shortfalls and future budgeted expenditures. This would have to be done by either grossly over-inflating their future budgets, or somehow eliminating Westmoreland's gross proceeds tax from the "taxable valuation" of Big Horn County.

In any event, the end result to the County and to the general public would be that the other taxpayers of Big Horn County would have to pick up a larger share of the revenue needs for the County's budget in order to provide County services, including schools. Clearly, the effect of the requested Order on the public interest, would be that other taxpayers in Big Horn County would end up paying the taxes to fill the void left by the deposit of Westmoreland's gross proceeds tax. What this would mean to the general public of Big Horn County is that while Westmoreland would be paying fewer taxes, and much of the Indians' property is exempt from County property taxes, the Indians and Westmoreland would continue to take advantage of County facilities, some of which were paid for by other citizens long before Westmoreland arrived, and would continue to receive County services. This leads to the other consideration of the Court for a preliminary injunction and that is the question of success on the merits.

As noted in the decision of the 9th Circuit, ultimately, the validity of a State tax where the conduct of non-Indians on the Reservation is involved depends upon a "particularized inquiry into the nature of State, Federal and Tribal interests at stake, an inquiry designed to determine whether, in the specific context, the exercise of State authority would violate Federal law." *White Mountain*

Apache Tribe v. Bracker, 448 U.S. 149, 100 Sup.Ct. 2586. As noted above, the dicta of the 9th Circuit suggested no presumptive conclusion with regard to the gross proceeds tax noting at page 1115,

> "As for the gross proceeds tax from coal tax, the record is insufficient at this stage of the proceeding to reveal what State, Tribal, and Federal interests may be involved, or to indicate whether the tax's impact is sufficient to thwart the policies of the 1938 Act."

As noted in the decision of the 9th Circuit, the Tribe must show that taxes substantially affect its ability to offer governmental services or its ability to regulate the development of Tribal resources, and that the balance of State and Tribal interests renders the State's assertion of taxing authority unreasonable. *Crow* (650 F.2d 1117 [sic] 1971).

All of the gross proceeds tax is expended in Big Horn County, and the population of Big Horn County is approximately 50% Indian and 50% non-Indian. And the Tribe has no gross proceeds tax which has been approved, especially as it would relate the ceded area. Nor does the Tribe provide any services to the ceded area or to Westmoreland or to Big Horn County. Without going into all of the facts and arguments on the merits of the gross proceeds tax, which will be addressed more fully in Defendant's post trial Brief, Defendants submit that the particularized inquiry into the gross proceeds tax reveals that the interests of the County in imposing that tax far outweigh any impacts of that tax on the ability of the Crow Tribe to regulate themselves. One of the biggest complaints of the non-Indian citizens of Big Horn County

is that the Indians do not pay certain property taxes, yet they demand equal services as other citizens of Big Horn County, and Defendants submit that any Federal payments in lieu of taxes are inadequate to meet all of those County services. Defendants submit that a particularized inquiry into the State, Tribal and Federal interests at stake with regard to the gross proceeds tax substantiates its validity. A deposit of Westmoreland's gross proceeds tax at this time not only would cause an administrative nightmare, but is unwarranted on the particularized inquiry on the merits.

RESPECTFULLY SUBMITTED THIS 30th day of April, 1984.

ANDERSON, BROWN, GERBASE,
CEBULL & JONES, P.C.

By: /s/ John W. Ross
JOHN W. ROSS
315 North 24th Street
P. O. Drawer 849
Billings, MT 59103-0849
ATTORNEYS FOR DEFENDANTS

(Certificate Of Service Omitted In Printing)

JEROME ANDERSON
JOHN W. ROSS
Anderson, Brown, Gerbase,
Cebull & Jones, P.C.
315 North 24th Street
P. O. Drawer 849
Billings, Montana 59103-0849

CHRIS D. TWEETEN
Assistant Attorney General
State of Montana
Justice Building
215 North Sanders
Helena, Montana 59620
Telephone: (406) 444-2026

JIM CARLSON
Attorney,
Treasure County
P. O. Box 72
Hysham, Montana 59038

LANCE PEDERSON
Attorney,
Big Horn County
Hardin, Montana 59034

ATTORNEYS FOR DEFENDANTS,
THE STATE OF MONTANA

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
BILLINGS DIVISION

THE CROW TRIBE OF INDIANS, Plaintiffs,	NO. CV-78-110-BLG
and	
UNITED STATES OF AMERICA, Plaintiff-Intervenor,	**DEFENDANTS' POST-HEARING MEMORANDUM IN OPPOSITION TO MOTION TO DEPOSIT AND MOTION FOR A PRELIMINARY INJUNCTION**
-v-	
THE STATE OF MONTANA, Defendants,	
and	
WESTMORELAND RESOURCES, Defendant-Intervenor.	

I.
INTRODUCTION

Defendants file this Memorandum in response to Plaintiffs' and Plaintiff-Intervenor's May 18, 1984, Post-Hearing Memorandum filed in support of their Motion to Deposit and their Motion for Preliminary Injunction. Defendants believe that Plaintiffs and Plaintiff-Intervenor's Memorandum – (1) reflects a continued misunderstanding of the County budget process, and (2) glosses over or ignores actual impacts to the County and County Schools, which would result from a deposit of Westmoreland's gross proceeds payment, commencing May 31, 1984, and (3) misconstrues Defendants' argument regarding short and long-term impacts of such a deposit. On the other hand, Plaintiffs and Plaintiff-Intervenor's Memorandum says nothing about possible impacts to the Tribe in the event that the gross proceeds tax is not deposited and an injunction is not issued. This Memorandum of Defendants will briefly address each of these points.

II.
ARGUMENT

A. PLAINTIFF AND PLAINTIFF-INTERVENOR MISCONSTRUE OR DO NOT UNDERSTAND THE COUNTY BUDGET PROCESS

First, it is clear that Plaintiffs and Plaintiff-Intervenor still do not understand the meaning of "reserves" or "surpluses", as they are intended and exist in the County and school budgets. "Reserves" are defined in the budgets as the amount of money necessary to fund budgeted

expenditures from July 1 until additional tax collections are received in November. The reserves are *not* available to meet shortfalls or to compensate for non-receipt of taxes in the last part of the year. Using these "reserves", or "surpluses" to compensate for non-receipt of Westmoreland's tax payment rather than using them to fund their budgeted purpose for the remaining part of the year, would be like robbing Peter to pay Paul. Plaintiffs suggest that *some* transfers can be made among funds, but as Defendants have previously pointed out, there are statutory restrictions, or outright prohibitions, on transfers among funds. Because the "reserves" have already been budgeted to meet necessary and planned expenditures from June to November, 1984, the fact is that non-receipt of Westmoreland's May 31, 1984, tax payment, which had been built into the current budget, would cause some shortfalls and difficulties for the County.

B. THE FACT IS NON-RECEIPT OF WESTMORELAND'S GROSS PROCEEDS PAYMENT, COMMENCING MAY 31, 1984, WOULD RESULT IN BUDGET SHORTFALLS AND CAUSE PARTICULAR HARDSHIPS

Defendants submit that the statements in the Defendants' Affidavits and testimony – that there would be impacts and difficulties to the County and County Schools as a result of depositing Westmoreland's gross proceeds tax payment, commencing with the May 31, 1984, payment – are essentially uncontroverted. It was not the intent of the Defendants to offer any different information at the May 15, 1984, hearing, from that in the Defendants' Brief and Affidavit submitted on April 30,

1984. Rather, the testimony at the hearing was intended to illustrate the general problem of budget shortfalls and difficulties to the County and County Schools in the event that Westmoreland's gross proceeds tax payment is deposited commencing May 31, 1984. As an illustration of a particular hardship resulting from deposit of Westmoreland's tax, Joyce Lippert's testimony presented the example of the impact of such deposit on the hospital remodeling project. Lippert noted that the hospital, which is a benefit to all citizens of Big Horn County including Plaintiff Crow Tribe members is in the final stages of a major remodeling and that the "reserves" in the Hospital account, were budgeted in August of 1983, to meet certain expenditures to be made from June, 1984, to November, 1984, in order to complete that hospital remodeling project. She noted that the contractor has been on the hospital site for sometime and must be paid, and that equipment for the remodeling has been ordered and must be paid. There is no "surplus" in this hospital account, as shown in Defendants' Exhibit 501. Without receipt of Westmoreland's May 31, 1984, tax payment, the funds in this hospital remodeling fund will be inadequate to meet expenditures which have already been made or budgeted between now and November, 1984, and at this late date it is not possible or at least not rational to defer expenditures and not complete the hospital remodeling.

Lippert's testimony is – that such shortfalls and difficulties associated with completion of the hospital remodeling project, in the event of non-receipt of Westmoreland's May 31, 1984, gross proceeds tax payment are illustrative of other budgeted funds in the County.

Secondly, the testimony of Roberta Snively, was that there would be an approximately 6% shortfall in the County School budgets in the event that Westmoreland's May of 1984 tax payment is escrowed. Snively also pointed out that by statute, certain School accounts cannot and do not have any cash reserves. Even the Plaintiffs, on page 5 of their Post-Hearing Memorandum, note that there are two accounts, elementary tuition and elementary debt service, that have no cash reserves or surpluses. But, Plaintiffs fail to note that the high school debt service is also a fund without cash reserves. More importantly, Plaintiffs casually suggest that "The School Board or County Commissioners surely have sufficient flexibility to devise a remedy for these two minor shortfalls". (Plaintiffs' Memorandum, page 5). Plaintiffs do not quote any section of the law that could remedy such shortfalls and the witness, Snively, is not aware of any procedure that could address this shortfall. Defendants submit that it is not proper to characterize these shortfalls as "... minor shortfalls.", because, for example, the elementary and high school debt service was budgeted to meet bond payments, which bond payments must be made when such payments are due or the county schools will be in default. These problems and shortfalls are illustrative of the short-term problems that would result to the County and County Schools, in the event that Westmoreland's May 31, 1984, tax payment is not received on May 31, 1984.

As previously noted, these short-term problems associated with the county budget process and the gross proceeds tax are different from the situation presented by a deposit of the severance tax and the State budgetary

process because the County expenditures budgeted in August of 1983 for expenditures through November of 1984, were done on the basis that Westmoreland's gross proceeds makes up part of the "taxable value", under Montana law, and will remain part of that "taxable value", until and if determined otherwise, and, therefore, the County is planning on receipt of Westmoreland's May 31, 1984, tax payment to meet its obligations through November of 1984. The status quo is that Westmoreland is still a taxpayer, and an agreement between Westmoreland and the Tribe, or a preliminary injunction, should not disrupt that status quo, particularly when Defendants believe that the Plaintiffs have not shown that they will prevail on the merits.

It is true that the short-term problems received the initial emphasis of the Defendants and it is still Defendants' position that these short-term problems exist and are not easily met. Defendants submit that the assertions in the testimony and Affidavits supporting the short-term problems are still uncontroverted. However, in addition to the short-term impacts, Defendants pointed out at the hearing on May 15, 1984, that the short-term problems could get worse as time goes on in the event of a deposit of the funds, which argument of Defendants was intended in no way to diminish the impact of the short-term problems.

C. DEFENDANTS MISINTERPRET THE COUNTY'S ARGUMENT REGARDING LONG-TERM PROBLEMS.

On page 6 of the Plaintiff and Plaintiff-Intervenor's Post-Hearing Memorandum, Plaintiff and Plaintiff-Intervenor suggest the County's argument has come full circle, and they incorrectly state "that the County, in its closing argument, conceded that the short-term problems were easily met, and, instead, the County now argues that it is the long-term problems that dictate the motions be denied". That interpretation by the Plaintiffs and Plaintiff-Intervenor is just plain wrong. As noted above, the Defendants and the Defendants' witnesses have established that in the event that Westmoreland's May 31, 1984, tax payment is not received. There will, in fact, be short-term shortfalls and difficulties between now and November, 1984. However, the Defendants, believing that the short-term impacts were established and uncontroverted, also pointed out that there may well be long-term impacts from a deposit of Westmoreland's gross proceeds tax, based on the premise that the Plaintiffs' Motion to Deposit covers all future gross proceeds tax payments. In the event that this litigation continues for some time, the situation caused by such a deposit would become worse as time goes on. The long-term logistic difficulties to the County could be substantial. Westmoreland's gross proceeds tax would still be considered part of the County's "taxable value", and it would be difficult for the County to raise additional revenues to meet necessary expenditures. The County may clearly be without necessary funds for an effective government. In the event that the County could somehow raise additional revenues

from other taxpayers besides Westmoreland, the Defendants were to ultimately prevail and the gross proceeds tax is sustained, the County may face the expensive and confusing process of refunds to other taxpayers who made up the shortfalls caused by Westmoreland's deposit.

While Defendants misinterpret or try to gloss over the short and long-term impacts of a deposit to the County, they say nothing in their Post-Hearing Memorandum about the hardships to the Tribe in the event their Motions are denied, and ignore the statutory provisions to protect their interests.

D. THE PLAINTIFFS AND PLAINTIFF-INTERVENOR HAVE NOT SHOWN ANY SUBSTANTIAL HARDSHIP OR SERIOUS QUESTIONS RAISED BY PAYMENT OF WESTMORELAND'S GROSS PROCEEDS TAX PAYMENT TO THE COUNTY.

As noted at the hearing on May 15, 1984, the Plaintiffs and Plaintiff-Intervenor, have merely stated that "once Westmoreland pays the disputed taxes to the County, they become more difficult to recover." (Plaintiffs' Reply Memorandum, page 9, May 8, 1984). The Plaintiffs make *no* argument in their Post-Hearing Memorandum with regard to such alleged difficulties to the Plaintiffs or Plaintiff-Intervenor in the event Westmoreland's tax is not deposited. Furthermore, the Plaintiff and Plaintiff-Intervenor, which has the burden of proof to support their Motions, presented no witnesses, and only presented one short unsigned Affidavit of Joe Presley, President of Westmoreland, in conjunction with their

original Motions and Memorandums, and did not even tender Presley for cross-examination. Defendant submits that the Plaintiff and Plaintiff-Intervenor have not shown that they will prevail on the merits and have not raised any serious questions or shown substantial harm to them in the event that Westmoreland's gross proceeds tax is not deposited.

Finally, Defendants submit that Plaintiffs have completely ignored the Defendants' position that the County is good for any lawful final Judgment issued against it and can pay such Judgment without the necessity of a deposit of Westmoreland's gross proceeds tax. Section 2-9-316 M.C.A. allows the political subdivisions of the State, including the County and School governments, to satisfy any lawful final Judgment out of funds from specified sources and in specified ways. This statutory provision allows the County to proceed in a more orderly fashion to meet its obligations, and also provides a means for the County to satisfy any lawful final Judgment issued against it, which Defendants submit makes a deposit of Westmoreland's gross proceeds tax unnecessary.

Respectfully submitted this 24th day of May, 1984.

ANDERSON, BROWN, GERBASE,
CEBULL & JONES, P.C.

By: /s/ John W. Ross
JOHN W. ROSS
315 North 24th Street
P. O. Drawer 849
Billings, MT 59103-0849
ATTORNEYS FOR DEFENDANTS

(Certificate Of Service Omitted In Printing)

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
BILLINGS DIVISION

THE CROW TRIBE OF INDIANS, Plaintiff, and UNITED STATES OF AMERICA, Plaintiff-Intervenor, -vs- THE STATE OF MONTANA, et al., Defendants, and WESTMORELAND RESOURCES, INC., Defendant-Intervenor.	CV-78-110-BLG ORDER (Filed May 25, 1984)

Pursuant to a forthcoming Memorandum Opinion,

IT IS ORDERED that the plaintiffs' motions for preliminary injunction and leave to deposit funds into the Court are denied.

The Clerk is directed forthwith to notify counsel for the respective parties of the making of this order.

Done and dated this 25th day of May, 1984.

/s/ James F. Battin
Chief Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
BILLINGS DIVISION

THE CROW TRIBE OF INDIANS, Plaintiff, and UNITED STATES OF AMERICA, Plaintiff-Intervenor, -vs- THE STATE OF MONTANA, et al., Defendants, and WESTMORELAND RESOURCES, INC., Defendant-Intervenor.	)	CV-78-110-BLG MEMORANDUM OPINION (Filed Jun. 22, 1984)

Plaintiff Crow Tribe and plaintiff-intervenor United States move for a preliminary injunction enjoining the State of Montana and Big Horn County from enforcing or collecting the State's gross proceeds tax on coal produced under a lease between the Tribe and Westmoreland Resources. Plaintiff, plaintiff-intervenor and Westmoreland move for leave to deposit into the Court's Registry sums representing these tax payments. These motions are directed at both a $715,728.33 tax payment due May 31, 1984, and all other gross proceeds tax payments that may

become due during the pendency of this litigation. Because of the time constraints accompanying the request for a preliminary injunction, the Court issued an order responding to these motions on May 25, 1984. Both motions were denied for the reasons set forth below.

The relief that movants seek with respect to the gross proceed tax is similar to the relief previously ordered with respect to the Montana Coal Severance Tax. On January 6, 1983, the Court issued an injunction against the collection of the severance tax and allowed Westmoreland to pay the equivalent of the severance tax payments into the Court's Registry. The Court premised its jurisdiction on 28 U.S.C. § 1362 and found that the Tax Injunction Act, 28 U.S.C. § 1341, was not a jurisdictional bar. The Court perceived that the difficulties the Tribe might encounter in recovering the severance tax, should judgment be entered in the Tribe's favor, would outweigh any hardship the State would endure if the tax, which represented only a small fraction of the State's general fund, was deposited into the Court's Registry.

In spite of the similarities in the relief requested, there is reason to treat the gross proceeds tax differently from the severance tax. Unlike severance tax revenues, gross proceeds tax revenues are used entirely at the county level, and in the coal-producing counties these revenues may comprise a significant percentage of the county budget. While the gross proceeds tax totals a substantial sum, it pales in comparison to the severance tax and therefore is less likely to be found to thwart the policies of the Mineral Leasing Act of 1938. 25 U.S.C. §§ 396a-396g. Further, the apparent legislative intent surrounding the severance tax is more likely to conflict with

the Mineral Leasing Act's purposes than does the legislative intent behind the enactment of the gross proceeds tax. *See Crow Tribe v. State of Montana*, 650 F.2d 1104, 1113-15 (9th Cir. 1981). The critical element, however, in determining whether injunctive relief is appropriate is the relative hardships to the parties. These hardships balance differently with respect to the gross proceeds tax than they did when the Court considered the severance tax in January 1983.

Before a moving party may obtain a preliminary injunction it "must demonstrate *either* a combination of probable success on the merits and the possibility of irreparable injury, or that serious questions are raised and the balance of hardships tips sharply in the moving party's favor." *Beltran v. Myers*, 677 F.2d 1317, 1320 (9th Cir. 1982) (emphasis in original). Even though all evidence in this case has been presented by the parties at trial, the Court is not bound at this preliminary injunction stage to decide the merits of this complex case. *See Dymo Industries, Inc. v. Tapewriter, Inc.*, 326 F.2d 141, 143 (9th Cir. 1964). The Court is neither prepared nor willing to state before the case has been submitted after final arguments on July 31, 1984, that plaintiffs have a probability of success on the merits, but there is no doubt that plaintiffs have raised serious questions concerning both the severance and gross proceeds taxes. The balance of hardships, however, does not tip sharply in the moving parties' favor.

Plaintiffs' principal contention is they will incur hardships in recovering a judgment, should plaintiffs ultimately prevail on the merits, if Westmoreland pays the gross proceeds to Big Horn County. Plaintiffs wish to

create a fund in the Court's Registry to which they can conveniently look for satisfaction of a judgment. The grounds for plaintiffs' hardship claims are not clear, and their fears may be unfounded. The gross proceeds revenues, unlike severance tax revenues, are earmarked and appear to be readily traceable. Further, Mont. Code Ann. 2-9-316 (1983) sets forth an orderly procedure for political subdivisions of the state to satisfy any lawful final judgment.

The hardships occasioned upon defendants by the granting of an injunction would be considerable. Affidavits of Big Horn County officials indicate that withholding Westmoreland's gross proceeds payments may cause both short and long term disruption in Big Horn County's government and school districts. The revenues received from Westmoreland are utilized primarily at the local level and constitute a significant portion of the county's total revenues. Plaintiffs argue that the county can cover the shortfall caused by payment of the gross proceeds tax into the Court's Registry with reserves and other surplus funds. This argument derives from an oversimplification of the county's administrative and fiscal responsibilities and an underestimation of the considerable practical and legal difficulties attendant to overcoming the budgetary constraints imposed by state law. Further, even if an injunction issued and the funds were deposited into the Court, it appears that the county must continue to treat Westmoreland's gross proceeds as part of the taxable valuation. This factor could contribute to a long-term hardship on Big Horn County.

Because the brunt of the hardships falls on defendants, the Court, applying the guidelines of this Circuit,

concludes that injunctive relief is inappropriate. Plaintiffs and the taxpayer, Westmoreland, are free to pursue any administrative or judicial remedies that may be available at the state level.

An order conforming to this memorandum opinion was issued on May 25, 1984.

Done and dated this 22nd day of June, 1984.

/s/ James F. Battin
Chief Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
BILLINGS DIVISION

THE CROW TRIBE OF INDIANS, Plaintiff, and UNITED STATES OF AMERICA, Plaintiff-Intervenor, -vs- THE STATE OF MONTANA, et al., Defendants, and WESTMORELAND RESOURCES, INC., Defendant-Intervenor.	CV 78-110-BLG-JFB **MEMORANDUM OPINION AND ORDER** (Filed June 9, 1988)

Presently pending before the Court are the Proposed-Intervenors' Motion for Leave to Intervene and Defendant-Intervenor Westmoreland Resources, Inc.'s Motion for Leave to Join Additional Parties. For the reasons stated below, both motions are denied.

FACTS AND PROCEDURAL BACKGROUND

Although the history of this case is well known to counsel and the Court, a brief review is in order at this time.

This case originated as a challenge by the Crow Tribe to the gross proceeds and severance taxes imposed by the State of Montana upon coal mined from the "ceded strip" of land adjacent to the Crow Reservation. Those taxes were imposed by the State in 1975. In 1976, the Tribe imposed its own severance tax on coal mined on the reservation.[1]

In 1978, the Crow Tribe filed the present action challenging the constitutionality of the State of Montana taxes as applied to coal mined on Indian land. The United States of America intervened as a party plaintiff, to protect its interests as trustee of the coal upon which the taxes were levied. Westmoreland, a lessee of the Tribe, intervened as a party defendant and asserted a counterclaim against the Tribe, challenging the tribal tax imposed upon it.

In 1982, Westmoreland and the Tribe entered into an amended lease agreement, wherein Westmoreland agreed to pay the tribal tax, less the amounts of severance and gross proceeds taxes paid to the State of Montana. The amended lease agreement was approved by the Crow Tribal Council, and by the Assistant Secretary of the Interior for Indian Affairs on September 29, 1982.

Beginning in January 1983, Westmoreland paid Montana severance tax payments into the registry of this Court, pending a determination as to the constitutionality

[1] A similar tribal tax enacted in 1982 for coal mined on the ceded strip was rejected by the Department of Interior because of a disclaimer of tribal jurisdiction contained in the Crow Constitution. *See, Crow Tribe of Indians v. State of Montana*, 819 F.2d 895, 897 (9th Cir. 1987).

of the State taxes. In November 1987, Westmoreland began paying Montana gross proceeds tax payments into the registry as well. On June 11, 1987, the Ninth Circuit Court of Appeals held that "Montana's coal taxes are preempted by federal law and policies" and that "the taxes are void for interfering with tribal self-government." *Crow Tribe of Indians v. State of Montana*, 819 F.2d 895, 903 (9th Cir. 1987). That decision was affirmed by the United States Supreme Court on January 11, 1988. *Crow Tribe of Indians v. State of Montana*, 108 S.Ct. 695 (1988). Now that the question of the State taxes' constitutionality has been resolved, this Court is called upon to determine the proper distribution of the approximately $28 million which has been paid into the registry of the Court by Westmoreland since 1983.

The Crow Tribe claims an entitlement to the funds based on the 1982 Lease Amendment between it and Westmoreland. Competing with the tribe for these funds are various utility customers of Westmoreland Resources.[2] These utility customers seek leave of Court to intervene on the ground that they have shouldered the financial burden of the State taxes, since the taxes were "passed through" to them under a provision in their contracts with Westmoreland. The utilities contend that their interest in the funds is superior to that of the Tribe.

Westmoreland supports the utilities' attempt to intervene, and alternatively requests joinder of the utilities as

[2] Northern States Power Company, Wisconsin Power and Light Company, Dairyland Power Cooperative, Interstate Power Company, Upper Peninsula Generating Company and Wisconsin Power Company.

parties to the action. Westmoreland does not dispute the Tribe's claim to the funds on its merits, but seeks resolution of the competing claims before release of any funds from the Court's registry, to avoid double liability for any payments made. The State of Montana and the United States of America oppose the Motions for Leave to Intervene and to Join Additional Parties. The State claims no entitlement to the funds in question, and takes no position on their release. The United States supports release of the funds to the Tribe.[3]

DISCUSSION

I. PROPOSED INTERVENOR'S MOTION TO INTERVENE

The utilities have moved for leave to intervene, to protect a claimed interest in funds paid into the registry of the Court by Westmoreland pursuant to the Court orders of January 6, 1983 and November 30, 1987. They allege that invalid Montana severance and gross proceeds taxes paid by Westmoreland were "passed through" to them, as a component of the cost of coal. As such, the utilities argue that they have reimbursed Westmoreland for the tax payments and are entitled to a retroactive

[3] The United States concedes that the funds at issue are owed to the Tribe by virtue of its exercise of governmental authority, and not its status as beneficial owner of the coal, and as such the Department of the Interior has no trust responsibility or authority over the tax receipts. *See*, United States Memorandum in Response to Motions for Release of Funds, to Add Parties, for Intervention, and for Stay of Disbursement of Funds, pg. 3.

price reduction for invalid taxes paid. The utilities claim an interest in the funds currently held by the Court, on the grounds that Westmoreland is apparently financially unable to grant such a price reduction and that the Tribe has no valid entitlement to the fund since it has no valid tax applicable to coal mined on the ceded strip.

A. TIMELINESS

The utilities seek intervention under Rule 24(a) (2) and (b) (2), Fed.R.Civ.P. Under Rule 24(a) (2), anyone with an interest in the subject of an action whose ability to protect that interest may be impaired by the disposition of the action, and whose interest is not adequately represented by other parties, shall be permitted to intervene "upon timely application". Under Rule 24(b)(2), an applicant whose claim or defense has a question of law or fact in common with the main action may be permitted to intervene "upon timely application". The first requirement for intervention under both sections is that application for intervention must be timely.

In determining timeliness, the Ninth Circuit Court of Appeals has stated that it looks to three factors: (1) the stage of the proceedings; (2) the prejudice to other parties; and (3) the reason for and length of the delay. *United States v. State of Oregon*, 745 F.2d 550, 552 (9th Cir. 1984). In applying these factors to the present motion, the Court remains mindful that the timeliness requirement for intervention as a matter of right should be treated more leniently than for permissive intervention because of the likelihood of more serious harm. *Id.* The Court must consider all the circumstances of the case in determining

whether a motion to intervene is timely. *Legal Aid Society of Alameda County v. Dunlop*, 618 F.2d 48, 50 (9th Cir. 1980). Mere lapse of time is not determinative. *State of Oregon*, 745 F.2d at 552.

This case was filed on July 13, 1978 and has been pending for almost a decade. At issue in the original action was the constitutionality of the State of Montana taxes, as applied to coal mined on the ceded strip. After two appeals to the Ninth Circuit and an appeal to the United States Supreme Court, that issue has been fully and finally resolved. All parties to the original litigation have operated under the assumption that, upon a determination that the State taxes are invalid, the funds held by the Court would be distributed to the Crow Tribe pursuant to the 1982 Lease Amendment. (*See*, *Crow Tribe v. State of Montana*, No. CV 78-110-BLG, Order of January 6, 1983 at page 5.)

The utilities seek to intervene during this final stage of the proceedings, presenting new and complex issues for resolution by the Court. Resolution of these issues, concerning the validity of the Crow tribal tax and the 1982 Lease Amendment, would inevitably involve another protracted round of litigation. The delay and financial deprivation resulting to the Tribe from additional litigation, combined with the already lengthy period of litigation, militate against granting leave for intervention at this time.

The utilities acknowledge that they have been aware of this litigation and of the 1982 Lease Amendment between Westmoreland and the Crow Tribe for several years. However, they attempt to justify the lengthy

period of non-involvement, claiming that they were not aware that the Amendment would be interpreted to require payments to the Crow Tribe in the absence of a valid tribal tax, and that they did not know until February, 1988 that Westmoreland would not seek to recover the funds held by the Court.

A review of the 1982 Lease Amendment reveals that there was a strong suggestion, if not a likelihood, that these events might occur. Page 1, Paragraph D of the Amendment states that Westmoreland and the Tribe "desire to resolve the dispute between them [concerning the Tribe's power to tax Westmoreland's mining operations] by this Amendment to the Amended Lease." Under Paragraph 4, resort to judicial determination of the tribe's power to impose taxes on Westmoreland is limited to the narrow circumstance that the parties are unable to agree on the amount of taxes to be paid to the Tribe after the State taxes are repealed or reduced. Paragraphs 5 and 6 of the Amendment specifically state that neither Westmoreland nor the Tribe has admitted the Tribe's power, or lack of power, to impose any tax on Westmoreland. A fair reading of the Amendment shows that the legal validity of the tribal tax remained very much a live issue, and that in an attempt to resolve the dispute Westmoreland had agreed to make payments and not raise that issue except in a very limited circumstance. Further, it was clear from Westmoreland's counterclaim against the Tribe that it did not intend to pursue a claim for the funds paid after the date of the Lease Amendment, on its own behalf or that of the utilities. (*See*, Westmoreland's Answer to Plaintiff's Third Amended Complaint, including Counterclaim and Cross-Claim, filed December 23, 1982, pg. 5-6.

It was incumbent upon the utilities, after the 1982 Lease Amendment, to take immediate affirmative steps to protect any interest which they might have in the funds paid by Westmoreland to this Court. The utilities failed to take any steps, although they knew or certainly should have known that their interests might be implicated and might not be adequately represented by Westmoreland. Although February, 1988 may have been the first time that the utilities realized that the end result of the litigation would not be entirely to their liking, the Court finds that they should have recognized the potential effects much sooner, and protected themselves much sooner. This motion to intervene, filed almost six years later, is untimely and must be denied.

Having so concluded, the Court would ordinarily not proceed to consider the additional requirements for intervention under Rule 24. Because of the significance of this decision, the Court wishes to briefly do so.

The Ninth Circuit has adopted a four-part test to determine whether an application under Rule 24(a)(2) should be granted:

(1) the motion must be timely;

(2) the applicant must assert an interest relating to the property or transaction which is the subject of the action;

(3) the applicant must be so situated that without intervention, the disposition may, as a practical matter, impair or impede its ability to protect that interest;

(4) the applicant's interest must be inadequately represented by the existing parties.

County of Orange v. Air California, 799 F.2d 535, 537 (9th Cir. 1986). After timeliness, the existence of a sufficient interest is the most crucial prerequisite to intervention.

In this case, it is true that the utilities may have a valid claim against Westmoreland for the State tax payments reimbursed by them. However, they do not have a significant, protectable interest in the particular funds held in the Court's Registry, since they did not actually pay the taxes to the State of Montana. To even begin to show the existence of an interest in these funds, the utilities must defeat the Tribe's interest by demonstrating the invalidity of the tribal taxes and the 1982 Lease Amendment. An attempt to do so would be foreclosed, since the Tribe is an indispensible party to and enjoys sovereign immunity from any such suits. *Chemehuevi Indian Tribe v. California State Board of Equalization*, 757 F.2d 1047 (9th Cir. 1985); *Lomayaktawa v. Hathaway*, 520 F.2d 1324 (9thCir. 1975); *Wichita and Affiliated Tribes of Oklahoma v. Hodel*, 788 F.2d 765 (D.C.Cir. 1986). Further, the utilities are not parties to the Lease Amendment, and therefore cannot challenge the validity of that document. Any interest, contingent as it is on challenges which are unlikely to succeed, does not form a sufficient basis for intervention in this action.

Nor does the fact that distribution of the funds may decrease the collectability of any judgment eventually obtained by the utilities against Westmoreland give the utilities a sufficient interest to intervene in this action. *See, e.g.*, *Hawaii-Pacific Venture Capital Corp. v. Rothbard*, 564 F.2d 1343, 1346 (9th Cir. 1977); *Jet Trader's Investment Corp. v. Tekair, LTD.*, 89 F.R.D. 560, 570 (D.Del. 1981). "Logically extended [allowing intervention on that basis]

would give the right to intervene . . . to all persons with potential claims against any party in the . . . action . . . on the ground that the outcome of the . . . suit may increase or decrease the collectability of their claims," *Id.*

Last, the utilities have not sufficiently shown that, without intervention, their ability to protect their "interest" is impaired or impeded. Distribution of the funds held by the Court will not, as a practical matter, foreclose any rights of the utilities in a subsequent proceeding. *See, Blake v. Pallan*, 554 F.2d 947, 954 (9th Cir. 1977); *County of Orange v. Air California*, 799 F.2d 535, 538-39 (9th Cir. 1986); *c.f., United States v. Stringfellow*, 783 F.2d 821, 826 (9th Cir. 1986); *Lake Investors Development Group v. Egidi Development Group*, 715 F.2d 1256 (7th Cir. 1983). The inconvenience of having to litigate these new issues separately does not constitute the sort of adverse effect contemplated in the Rule. *Blake*, 554 F.2d at 954. Since the elements for intervention under Rule 24(a)(2) are not present, the Court concludes that intervention under that Section is not proper.

Alternatively, the utilities seek to intervene under Rule 24(b)(2). Under that Section, an applicant may be permitted to intervene "when the applicant's claim or defense and the main action have a question of law or fact in common". In the present action, there are no remaining issues of law or fact to be resolved. Neither Westmoreland nor the State of Montana challenge the merits of the Crow Tribe's claim of entitlement to the funds in the Court's Registry. The United States supports release of the funds to the Tribe. Prior to the filing of the Motion to Intervene, the Court was prepared to distribute the funds to the Tribe. The utilities seek to raise new

issues, hoping to defeat the Tribe's entitlement and prove their own. However, the Court finds that resolution of those new issues is more appropriately had in a separate proceeding against Westmoreland.

The utilities reimbursed Westmoreland for State taxes paid, under the terms of the contracts between the Utilities and Westmoreland. Any refund of sums paid, through price reductions or otherwise, must come from Westmoreland. Westmoreland's obligations to the utilities, if any, are factually and legally distinct from Westmoreland's obligations to the Tribe, under the 1982 Lease Amendment. To allow the utilities to inject new issues into the original action would unnecessarily and improperly muddy the waters and delay the Tribe's receipt of that to which it is entitled. The Court therefore will not exercise its discretion to permit intervention.

II. WESTMORELAND'S MOTION TO JOIN ADDITIONAL PARTIES

Westmoreland seeks joinder of its utility customers as parties to this action, under Rule 19, Fed.R.Civ.P. Joinder is sought to protect Westmoreland from the multiple liability which it believes may occur if the funds held by the Court are distributed prior to judicial resolution of the utilities' claims.

Joinder under Rule 19 involves a two-step analysis. First, the Court "must determine whether the absent party should be joined as a 'necessary party' under subsection (a). Second, if the Court concludes that the nonparty is necessary and cannot be joined for practical or

jurisdictional reasons, it must then determine under subsection (b) whether in 'equity and good conscience' the action should be dismissed because the nonparty is 'indispensable'. *Northrop Corp. v. McDonnell Douglas Corp.*, 705 F.2d 1030, 1042 (9th Cir. 1983).

Subsection (a) of Rule 19 sets forth two categories of parties which should be joined if feasible:

> (1) [if] in the persons absence complete relief cannot be accorded among those already parties; or
>
> (2) [if] the person claims an interest relating to the subject of the action and is so situated that the disposition of the action in the person's absence may (i) as a practical matter impair or impede the person's ability to protect that interest, or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of the claimed interest."

Rule 19(a), Fed.R.Civ.P.

Rule 19(a)(1) requires joinder only when the absence of the unjoined party prevents complete relief among the current parties. *LCC Corp. v. Pension Benefit Guaranty Corp.*, 703 F.2d 301, 305 (8th Cir. 1983). The Court can discern no reason why the utilities' absence from this action would preclude complete relief between the Tribe, the United States, Westmoreland and the State of Montana. To the contrary, those parties have already obtained resolution of the issues raised in the original action, and do not contest the merits of the Tribe's claim to the funds.

The utilities are necessary parties, if at all, only under Rule 19(a) (2).

The initial inquiry under this subsection is whether the absent party claims a legally protected interest relating to the subject matter of the action. *Northrop*, 705 F.2d at 1030. As discussed in prior portions of this Memorandum Opinion, while the utilities no doubt have an interest in obtaining a refund from Westmoreland for any amounts wrongfully "passed through" to them under the contracts, the Court does not find any legally protectable interest relating to these particular funds. The Court therefore concludes that the utilities are not necessary parties to this action. Because the Court concludes that the utilities are not necessary parties to this action, it need not determine whether joinder is feasible and, if not, whether their presence would be indispensible.

Even assuming the existence of a sufficient interest to warrant joinder under Rule 19, neither of the remaining elements of joinder are met. The disposition of the original action will not impede or impair the utilities' ability to protect their interests, since the utilities are free to pursue a separate action against Westmoreland to recover amounts wrongfully paid. The Court cannot see any other reason why the utilities will be prejudiced by having to proceed against Westmoreland in a subsequent action.

Nor will disposition of the original action leave any of the original parties "subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of the claimed interest." Westmoreland is a party to two distinct sets of contracts, one with the Tribe (the 1982 Lease Amendment) and the other with

its utility customers. Depending upon the outcome of the issues raised by the utilities, Westmoreland may be able to pass its obligations to the Tribe through to its utility customers. It is also possible that Westmoreland may be liable to *both* the Tribe (under the 1982 Lease Amendment) and the utilities (to refund prior payments wrongfully passed through to them under their contracts.)[4] However, that result would ensue regardless of whether the utilities' claims are aired in this or a subsequent proceeding. The fact that Westmoreland may be liable on both of its contracts, instead of passing its payments to the Tribe through to its customers, does not create the type of inconsistent obligation contemplated in Rule 19. *See, e.g., First National Bank v. Platte Valley Bank,* 107 F.R.D. 120, 122 (D.Colo. 1985).

It is a misapplication of Rule 19(a) to add parties who are not necessary or indispensible, and who have a separate cause of action entirely. *Bakia v. County of Los Angeles,* 687 F.2d 299 (9th Cir. 1982). Since the utilities' claims against Westmoreland arise from different contracts and raise different legal issues from those litigated in the original action, Westmoreland's Motion to Join Additional Parties is denied.[5]

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[4] Copies of the contracts between the utilities and Westmoreland are not before the Court. The Court is thus unable to state with certainty what the result will be if the tribal taxes are eventually determined invalid.

[5] The Court also questions the timeliness of Westmoreland's Motion, for the same reasons as those stated with respect to the utilities' Motion for Leave to Intervene. See pgs. 5-7, supra; *See also, Seay v. McDonnell Douglas Corp.,* 533 F.2d 1126, 1132 (9th Cir. 1976).

CONCLUSION

This Court holds in its registry amounts paid by Westmoreland to the State of Montana, for taxes which were later determined to be unconstitutional. No party to the original action disputes the merits of the Tribe's entitlement to those funds, under the 1982 Lease Amendment, in the absence of valid State taxes. It has been apparent since 1982 that Westmoreland would not dispute its obligation to the Tribe, except in circumstances not relevant here. The Motions for Leave to Intervene and to Join Additional Parties are simply too late. Furthermore, the necessary elements for intervention and/or joinder under the Rules have not been met. The Court appreciates the utilities' effort to avoid all tax liability, thereby protecting the rights of their ratepayers. However, it would be unconscionable to allow them to pursue that effort at the expense of the Crow Tribe.

Based on the foregoing,

IT IS ORDERED that the Proposed-Intervenor's Motion for Leave to Intervene and Westmoreland Resources, Inc.'s Motion to Join Additional Parties be and are hereby denied.

IT IS FURTHER ORDERED that a hearing is set in this matter for June 23, 1988 at 9:00 o'clock a.m., Courtroom I, Federal Building, 316 North 26th Street, Billings, Montana, for the purpose of determining the validity of various liens asserted against the funds held in the Court's registry, and the final amount of funds to be distributed to the Crow Tribe.

The Clerk is directed forthwith to notify counsel for the respective parties and all lienors of record of the making of this order.

Done and dated this 9th day of June, 1988.

/s/ James F. Battin
Chief Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
BILLINGS DIVISION

THE CROW TRIBE OF INDIANS, Plaintiff, vs. UNITED STATES OF AMERICA, Plaintiff-Intervenor, vs. THE STATE OF MONTANA, et al., Defendants, vs. WESTMORELAND RESOURCES, INC., Defendant-Intervenor.	CV 78-110-BLG-JFB MEMORANDUM OPINION AND ORDER (Filed July 11, 1988)

Presently pending before the Court is the Motion of Westmoreland Resources, Inc. ("Westmoreland"), to amend its Answer in Opposition to the Crow Tribe's Motion for Release of Funds. The Tribe's Motion seeks an Order directing the Clerk to pay over to the Crow Tribe the Severance and Gross Proceeds Tax Funds which were

paid into the Registry of the Court pursuant to the Court's Orders of January 6, 1983, and November 30, 1987. Westmoreland originally did not challenge the merits of the Tribe's entitlement to the funds in question,[1] but now seeks to alter that position. Westmoreland challenges the validity of the Tribal severance tax as applied to coal mined by it on the Ceded Strip. In addition, Westmoreland has filed a motion for an emergency hearing based on its Amended Answer. For the reasons stated below, the Motion of Westmoreland to amend its Answer is granted, but no hearing is necessary to resolve the contentions made in the Amended Answer.

FACTS AND PROCEDURAL BACKGROUND

Much of the history of this case was reviewed by the Court in its Memorandum, Opinion and Order dated June 9, 1988. That history need not be repeated here. However, the background of events which led to the Amended Lease Agreement in 1982 between Westmoreland and the Tribe requires some elaboration.

In January, 1976, the Crow Tribal Council enacted an ordinance in Resolution No. 76-21A referred to as the

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[1] Because none of the existing parties challenged the merits of the Tribe's entitlement to the funds at the time of this Court's most recent Memorandum Opinion and Order of June 9, 1988, the validity of the tribal tax was not addressed therein. The issue has now been properly raised, and its determination is necessary for a full and final resolution of this matter. The Court will therefore now proceed to rule on that issue. The issue has been previously briefed by the parties in relation to the Crow Tribe's Motion for Release of Funds, and further briefing or oral argument is not deemed necessary by the Court.

Crow Tribal Coal Taxation Code which imposed a coal mining tax on each ton of marketable or merchantable coal severed or produced by means of strip coal mining or underground mining by a person within the Crow Tribe Reservation. The boundaries of the Reservation were defined in the tax ordinance to include the mineral estate held in trust by the United States for the Crow Tribe under that property known as the "Ceded Area" wherein the surface was ceded but the mineral estate was retained pursuant to the Cession Act of 1904, Act of April 27, 1904, 33 Stat. 352.

The tax rate was to be 25% of the contract sales price for each ton of coal. Because no deductions from the contract sales price were to be allowed for taxes paid to state or local governments (unlike the deductions permitted under Montana law in computing the amount of the tax), the amount of the Tribal tax probably would be slightly more than the amount of the Montana tax.

In accordance with the requirements of the Constitution of the Crow Tribe, the Taxation Code was submitted to the Department of Interior for approval. The Department approved the 1976 Taxation Code as it applied to the acknowledged Reservation but withheld its approval of the tax as it might be applied to mining activities on the Ceded Strip because it believed that the application of the tax to the mining of Crow coal on the Ceded Strip would be beyond the authority given to the Tribe by Article VI, Section 20 of the Constitution of the Crow Tribe. That provision authorized the Crow Tribal Council to impose taxes upon nonmembers of the Crow Tribe "doing business within the boundaries of the Crow Indian Reservation."

In response to that ruling, in January 1978, the Crow Tribe took steps to amend its Constitution so as to give it authority to tax the mining of coal on the Ceded Strip, reaffirmed its 1976 Crow Coal Taxation Code as it pertained to activities on the Ceded Strip and submitted both the amendment to the Constitution and the Taxation Code to the Department of the Interior for approval. Westmoreland opposed that application as it had opposed the original application because its operations would be adversely affected by having to bear both a 30% state severance tax and a 25% Crow Tribe coal mining tax.

In order to resolve the controversy between Westmoreland and the Tribe with respect to the Tribe's power to impose a tax on activities on the Ceded Strip, in 1982 Westmoreland and the Tribe entered into an Amended Lease Agreement wherein Westmoreland agreed to pay the Tribe a tax equal to the Montana state coal severance tax and the Montana state gross proceeds tax existing at that time and applicable to the mining of coal less whatever amount is required to be paid in severance and gross proceeds taxes to the State of Montana or its political subdivisions. The Crow Tribe also undertook to have the amendment to its Constitution approved by the Department of the Interior. Westmoreland jointly petitioned the Court with the Crow Tribe to pay the Montana state coal severance tax into Court pending resolution of the controversy as to whether or not the Montana coal severance tax was valid.

The Amended Lease Agreement was approved by the Crow Tribal Council. The Assistant Secretary of the Department of the Interior for Indian Affairs approved that agreement on September 29, 1982. The proposed

amendment to the Crow Tribe's Constitution and the Crow Tribal Taxation Code reaffirming the application of the amended Taxation Code to activities on the Ceded Strip was never approved by the Department of the Interior.

Westmoreland's Amended Answer to the Motion of the Tribe to release the funds claims that the Tribe is not entitled to the funds because it never put into effect a valid tax applicable to Westmoreland's mining activities on the Ceded Strip. Westmoreland's petition points out that it agreed only to pay a "tax" and that the Tribe never obtained approval by the Department of the Interior of any tax applicable to its activities on the Ceded Strip.

The Crow Tribe claims that it is entitled to the release of the proceeds because the 1982 Amended Lease Agreement constitutes a valid contractual obligation of Westmoreland. The Tribe, moreover, claims that it has had a valid tax in effect at all material times. The Tribe claims that the 1976 Tribal Coal Tax was properly applicable to the activities of Westmoreland in mining Tribal coal which has always been a part of the Reservation. In addition, the Tribe claims that the 1982 Amended Lease Agreement between Westmoreland the Tribe was itself a valid tax having been enacted by the Crow Tribe and approved by the Department of Interior.

DISCUSSION

Assuming the trust of everything that is said by Westmoreland in its Amended Answer in Opposition to the Motion for Release of Funds and in its Motion for a hearing on its claim that it is entitled to the funds, the

Court finds that the Crow Tribe of Indians, not Westmoreland, is entitled to the funds held in the Court. At all relevant times, the Crow Tribe has had a valid coal mining tax applicable to the mining by Westmoreland of its coal even though Westmoreland's mining activities were conducted on the Ceded Strip. The Court of Appeals for the Ninth Circuit has twice found that the underlying minerals which Westmoreland has been mining are a "component of the Reservation land itself." Crow Tribe of Indians v. State of Montana, 819 F.2d 895, 898. As observed by the Court of Appeals in its opinion in *Crow II*, this conclusion follows the plain meaning of the 1958 Act which restored to Reservation status all lands returned to Tribal ownership under the Act. 819 F.2d at 898. That decision has been affirmed. *Crow Tribe of Indians v. State of Montana*, 108 S.Ct. 695 (1988).

This analysis of the Reservation status of the Crow coal compels the conclusion that the approval which the Department of the Interior gave to the 1976 tax ordinance was fully applicable to Westmoreland's mining of Crow Ceded Strip coal because that coal was and is a component of the Reservation land itself. The approval of the Department of Interior of the 1976 Crow Tribal Tax Code as it applied to activities on the Reservation was necessarily an approval of that tax as being applicable to Westmoreland's mining of Crow Tribal coal. Accordingly, the Interior Department's purported refusal to approve the tax as it might apply to any mining operation on the Ceded Strip was based on what the Ninth Circuit has found to be a mistaken interpretation of the applicable law.

The Crow Tribal Coal Taxation Code was modified and amended with respect to Westmoreland by the 1982 amendment to the lease which was approved by the Crow Tribal Council and the Department of the Interior. Accordingly, the amendment to the lease by reference to Montana law sets the applicable tax rate and conditions of computation and payment. The amount in the escrow fund is the result of payments by Westmoreland at the tax rate governed by the 1976 Crow Tribal Coal Taxation Code as modified and amended by the 1982 amendment to the lease.

Based on the foregoing,

IT IS ORDERED that the Motion of Westmoreland Resources, Inc., to amend its answer in opposition to the Crow Tribe's Motion to release funds is granted.

IT IS FURTHER ORDERED that the relief sought by Westmoreland Resources, Inc., in its Answer is denied because at all relevant times the Crow Tribe has had in effect a valid tax which Westmoreland Resources, Inc., has paid pursuant to the 1982 amendment to the lease, which funds are now in the escrow fund.

The Clerk is directed forthwith to notify counsel for the respective parties and all lienors of record of the making of this order.

Done and dated this 11th day of July, 1988.

/s/ James F. Battin
Chief Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
BILLINGS DIVISION

THE CROW TRIBE OF INDIANS,	)	CV 78-110-BLG-JFB
Plaintiff,	)	
-vs-	)	
UNITED STATES OF AMERICA,	)	
Plaintiff-Intervenor,	)	MEMORANDUM AND ORDER
-vs-	)	
THE STATE OF MONTANA, et al.,	)	(Filed Sep. 19, 1988)
Defendants,	)	
-vs-	)	
WESTMORELAND RESOURCES, INC.,	)	
Defendant-Intervenor.	)	

On September 8, 1988, a hearing was held in the above-captioned case concerning the disposition of approximately $29 million in Crow Tribal coal severance tax funds currently held in the registry of this Court. The issue presented for resolution at this time is whether the funds should be released directly to the Tribe as tribal tax revenues, pursuant to a 1982 Amendment to an Amended Lease entered into between the Crow Tribe and Westmoreland Resources, Inc., or whether the funds should be

turned over to the United States in trust for the Tribe, based on §8 of the 1982 Crow Tribal Coal Taxation Code.

Under the terms of the ordinance enacting the Crow Tribal Coal Tax, payment of coal severance taxes "shall be made in quarterly installments to the Treasury in trust for the Crow Tribe of Indians . . . ". *See*, 1982 Crow Tribal Coal Taxation Code, §8. The tax ordinance was modified with respect to Westmoreland Resources, Inc., by the execution of an Amendment to the Amended Lease Agreement between Westmoreland and the Tribe, entered into in 1982. The Tribe maintains that the Lease Agreement, as amended, supercedes [sic] the provisions of the Tax Code and requires that any coal severance tax payments made by Westmoreland be paid directly to the Tribe, as Lessor.[1] The United States, on the other hand, argues that the two enactments must be construed together, and any terms which are capable of co-existence must be retained. Since the Amended Lease Agreement does not expressly repeal the provisions of §8, they remain in force.

Having carefully considered the briefs and oral arguments of counsel, the Court is inclined to agree with the United States, that these funds are properly paid to the United States in trust for the Tribe. While the terms of the Amendment to the Amended Lease Agreement establish the obligation of Westmoreland to pay a tax to the Tribe, that document does not itself establish clear terms for the payment of the tax. Repeals by implication are not

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[1] The amendment provides that the "Lessee will from time to time pay to the Lessor a tax . . . " *See*, Amendment to Amended Coal Mining Lease of Indian Lands, page 1, para. 1.

favored, *Morton v. Mancari*, 417 U.S. 535, 549 (1974), and any provisions of the Crow Tribal Tax Ordinance which were not expressly repealed or directly and clearly contradicted by the Amendment, remain in force with respect to Westmoreland. Thus, the §8 requirement that severance tax payments be made to the Treasury instead of directly to the Tribe remains a binding provision. Although the Tribe has attempted to repeal that provision, during the course of a July, 1988 Tribal Council meeting, the record indicates that the Secretary disapproved the repeal. As such, this Court cannot give legal effect to any such purported repeal. (Constitution and Bylaws of the Crow Tribal Council, Article VII, para. 10.)

At the time the Crow Tribal Coal Tax Ordinance was enacted, the Crow Tribe sought, and obtained the government's acceptance of, a trust relationship with respect to these particular tribal tax revenues. That trust relationship remains in existence to this date, and mandates release of these funds to the United States in trust for the Crow Tribe. Because this trust responsibility encompasses a complete authority over the management of funds so reposed, the Court finds that it would not be appropriate at this time to disburse any of the funds to accommodate liens or other claims presently asserted against the funds. Those matters may be resolved by the United States, after distribution of the funds by this Court.

With respect to certain funds previously paid directly to the Tribe by this Court and by Westmoreland Resources, Inc., the Court notes that at the time those distributions were made, in May, 1988 and August, 1988, the proper recipient of the funds had not yet been determined, and the United States either took no position or

had no objection to direct distribution to the Tribe. The Court therefore concludes that Westmoreland acted in complete good faith and proceeded in a reasonable manner under the circumstances, in making payment directly to the Tribe. Liability may not attach to Westmoreland at this time or in the future, based on this conduct.

Finally, because the Court sees no just reason to delay distribution of the funds in question in the manner previously described, judgment will be entered at this time, notwithstanding the fact that other claims for relief remain outstanding.

Based on the foregoing,

IT IS ORDERED that any and all Crow Tribal Coal Severance Tax funds currently held in the registry of this Court, including principal and interest, shall be distributed to the Department of Treasury of the United States, to be held in trust for the Crow Tribe. Distribution shall be made on October 25, 1988, pursuant to the terms of a forthcoming Memorandum and Order which will set forth in greater detail the basis for this decision as well as the terms of distribution.

The Clerk is directed to enter judgment accordingly.

The Clerk is further directed forthwith to notify counsel for the respective parties of the making of this order.

Done and dated this 19th day of September, 1988.

/s/ James F. Battin
Chief Judge

United States District Court

DISTRICT OF MONTANA

THE CROW TRIBE OF INDIANS - Plaintiff vs UNITED STATES OF AMERICA - Plaintiff-Intervenor V. THE STATE OF MONTANA, et al - Defendants vs WESTMORELAND RESOURCES, INC. - Defendant-Intervenor	**JUDGMENT IN A CIVIL CASE** CASE NUMBER: CV 78-110-BLG-JFB

__ Jury Verdict. This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

xx Decision by Court. This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED

THAT ANY AND ALL CROW TRIBAL COAL SEVERANCE TAX FUNDS CURRENTLY HELD IN THE REGISTRY OF THIS COURT, INCLUDING PRINCIPAL AND INTEREST, SHALL BE DISTRIBUTED TO THE DEPARTMENT OF TREASURY OF THE UNITED STATES, TO BE HELD IN TRUST FOR THE CROW TRIBE. IDSTRIBUTION [sic] SHALL BE MADE ON OCTOBER 25, 1988, PURSUANT TO THE TERMS OF A FORTHCOMING MEMORANDUM AND ORDER WHICH WILL SET FORTH IN GREATER DETAIL THE BASIS FOR THIS

DECISION AS WELL AS THE TERMS OF DISTRIBUTION.

SEPTEMBER 19, 1988 Date	LOU ALEKSICH, JR. Clerk /s/ Sandra L. Illegible By Deputy Clerk Court (Seal)

SETTLEMENT AGREEMENT

THIS SETTLEMENT AGREEMENT is entered into by and between the State of Montana ("Montana"), Big Horn County ("County"), and Westmoreland Resources, Inc. ("Westmoreland").

Recitals

WHEREAS, a dispute has arisen between Montana, the County and Westmoreland over the validity of imposing the Montana coal severance tax, Mont. Code Ann. §§ 15-35-101 to 15-35-205 (1989), and the Montana coal gross proceeds tax, Mont. Code Ann. §§ 15-23-701 to 15-23-703 (1989), upon certain ceded-strip production at the Absaloka facility mined pursuant to a lease with the Crow Tribe for some or all of the period between 1974 and 1987;

WHEREAS, Westmoreland was granted leave to intervene as a defendant in *Crow Tribe v. Montana*, No. CV-78-110-BLG; (D. Mont.), in November 1978 and asserted a cross-claim against, *inter alia*, Montana and the County in connection with such dispute;

WHEREAS, a cross-claim was most recently reasserted in Westmoreland's responsive pleading to the Crow Tribe's third amended complaint in No. CV-78-110-BLG; and

WHEREAS, the parties desire to resolve finally and conclusively and claims by Westmoreland to coal severance and gross proceeds tax payments made to Montana and the County between 1974 and 1987 with respect to

coal mined at the Absaloka facility pursuant to any lease with the Crow Tribe,

NOW, THEREFORE, it is agreed by and among the parties hereto as follows:

1. Westmoreland shall dismiss with prejudice its cross-claim against, *inter alia*, Montana and the County in its responsive pleading to the third amended complaint filed by the Crow Tribe in No. CV-78-110-BLG, with all parties to bear their own costs. Westmoreland further abandons, waives and otherwise disclaims any claim of entitlement for refund of coal severance of gross proceeds taxes paid to Montana and the County between, and including, the years of 1974 and 1987 with respect to ceded-strip production at its Absaloka facility pursuant to any leases with the Crow Tribe and shall not initiate any future judicial or administrative proceedings against Montana, the County, or their officers or employees to recover such taxes.

2. Montana shall tender the sum of $49,900 and the County shall tender the sum of $100 to Westmoreland upon receipt of this agreement fully executed by Westmoreland and an order in No. CV-78-110-BLG dismissing with prejudice Westmoreland's cross-claim asserted in its responsive pleading to the third amended complaint.

3. The parties recognize that this agreement represents a compromise of disputed legal claims and that execution thereof shall not be construed as an admission of the validity of such claims.

IN WITNESS WHEREOF, the parties have executed this agreement on those dates set forth below.

STATE OF MONTANA

/s/ Denis Adams
DENIS ADAMS
Director
Montana Department of Revenue

Date: 9-6-91

BIG HORN COUNTY

/s/ John Doyle
JOHN DOYLE
Chairperson
Big Horn County Commission

Date: 8-20-91

WESTMORELAND RESOURCES, INC.

/s/ C. Joseph Presley
C. JOSEPH PRESLEY
President

Date: 8-13-91

PLAINTIFF'S EXHIBIT 319

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
BILLINGS DIVISION

CROW TRIBE OF INDIANS AND UNITED STATES OF AMERICA, Plaintiffs v. STATE OF MONTANA, ET AL. Defendants.	Civil No. 78-110 BLG-JDS

EXPERT WITNESS REPORT

Prepared by

Mark P. Berkman
Vice President

National Economic Research Associates, Inc.
Four Embarcadero Center, Suite 3250
San Francisco, California 94111
(415) 291-1000

May 3, 1993
(Revised March 31, 1994)

Expert witness for the Crow Tribe of Indians and the United States

I. INTRODUCTION AND SUMMARY

A. Summary

A National Economic Research Associates, Inc. (NERA) was retained by the U.S. Department of Justice to address several questions regarding the Crow Tribe's claims set forth in *Crow Tribe of Indians and United States of America v. State of Montana et al.* These questions and our findings are summarized as follows:

1. **In the absence of severance and gross proceeds tax revenues from Crow coal, did Montana and Big Horn County collect sufficient taxes from Westmoreland's Absoloka Mine during the period 1976 through 1986 to cover costs and burdens associated with that mine?**

   NERA has concluded that Montana and Big Horn County did collect sufficient revenues to cover the state and county's mine-related costs. As shown by Figure 1.1, these revenues, which included taxes and royalties earned on coal mined by Westmoreland on state lands, property and income taxes of Westmoreland and the mine contractor and personal income taxes of mine and related workers, totalled $29.3 million during the period 1976 through 1986. This greatly exceeds any governmental costs which can reasonably be associated with the mine.

2. **What is the current value of the severance taxes paid by Westmoreland to the State of Montana from fiscal years 1976 to 1982 on Crow coal and the gross proceeds taxes paid**

   by Westmoreland to Big Horn County from fiscal years 1976 to 1987 on Crow coal?

   NERA has determined the current value of these back taxes, including interest, is $315.5 million. This value is based on the taxes paid by Westmoreland in each year and annual interest rates corresponding to Montana's returns on its Coal Trust Fund. Figure 1.2 shows the actual amount paid and the interest earned for both the severance and gross proceeds taxes. A total of $46.8 million was paid in severance tax and $11.4 million was paid in gross proceeds tax. Interest on these payments totalled $257.3 million over the period.

3. **What is the value of the Crow Tribe's income loss as a result of the cancellation of Shell Oil Company's contracts to sell two utilities 8,000,000 tons of coal annually for twenty years under Shell's coal lease with the Crow Tribe?**

   NERA has calculated the Tribe's lost income to be $327.1 million. NERA determined this value by comparing what the Tribe would have earned if Shell's utility contracts had not been cancelled to the current value of the coal which remained in the ground because the contracts were cancelled. The current value is calculated using the proposed coal lease agreement between the Crow and Arch Minerals. The difference between the values of

the Shell contracts and the Arch agreement is NERA's damage determination of $327.1 million. This damage calculation is summarized in Table 1.1.

4. **Does the Crow Tribe need the revenues in question to provide government services to its members and to promote economic development on the Reservation?**

NERA has compiled information from the U.S. Census Bureau on employment, income and poverty on the Crow Reservation and the surrounding area. Data from the Census show that the Crow are much worse off economically than their non-Indian neighbors. In addition, economic conditions have worsened for the Tribe over the last 10 years, as measured by several important statistics. NERA calculated that the Crow would need to spend $38.7 million annually to bring Crow Tribe members to income parity with the rest of the State's residents.

B. Background

The State of Montana imposes several taxes on the production of coal including a severance tax, a gross proceeds tax and a resource indemnity tax. The severance and gross proceeds taxes were enacted in 1975 and went into effect in the same year. Severance tax revenues have been earmarked by the State for a variety of purposes, chief among which is the establishment of a permanent Coal Trust Fund. Initially, the Trust Fund was allocated 25

percent of the severance tax revenues (between fiscal years 1977 and 1979). The share was increased to 29.625 percent between July 1, 1979 and December 31, 1979 and then increased to a 50 percent share where it has remained. This fund has grown steadily over the years. At the end of fiscal year 1993, the Trust Fund stood at $497.6 million. This figure understates the value of the Trust Fund to the State. The State has invested the Trust Fund primarily in commercial and government bonds, generating substantial interest income which has been spent for numerous purposes. As shown in Table 1.2, the State has earned $535.6 million in interest over the period of fiscal year 1976 through fiscal year 1993. Thus, the State has enjoyed a combined revenue (Trust Fund plus interest) of $1 billion. All of the Westmoreland mine severance tax payments on Crow coal plus interest reinvested represent 25.4 percent of this figure. The State has also earned interest on other trust funds in which coal severance taxes were deposited. If the State had elected to invest and reinvest all of its severance tax revenues and interest income each year, as shown in Table 1.3, it would have a fund balance of $3.8 billion at the end of fiscal year 1993. All of the Westmoreland mine tax payments on Crow coal plus interest reinvested represent 6.9 percent of this amount.

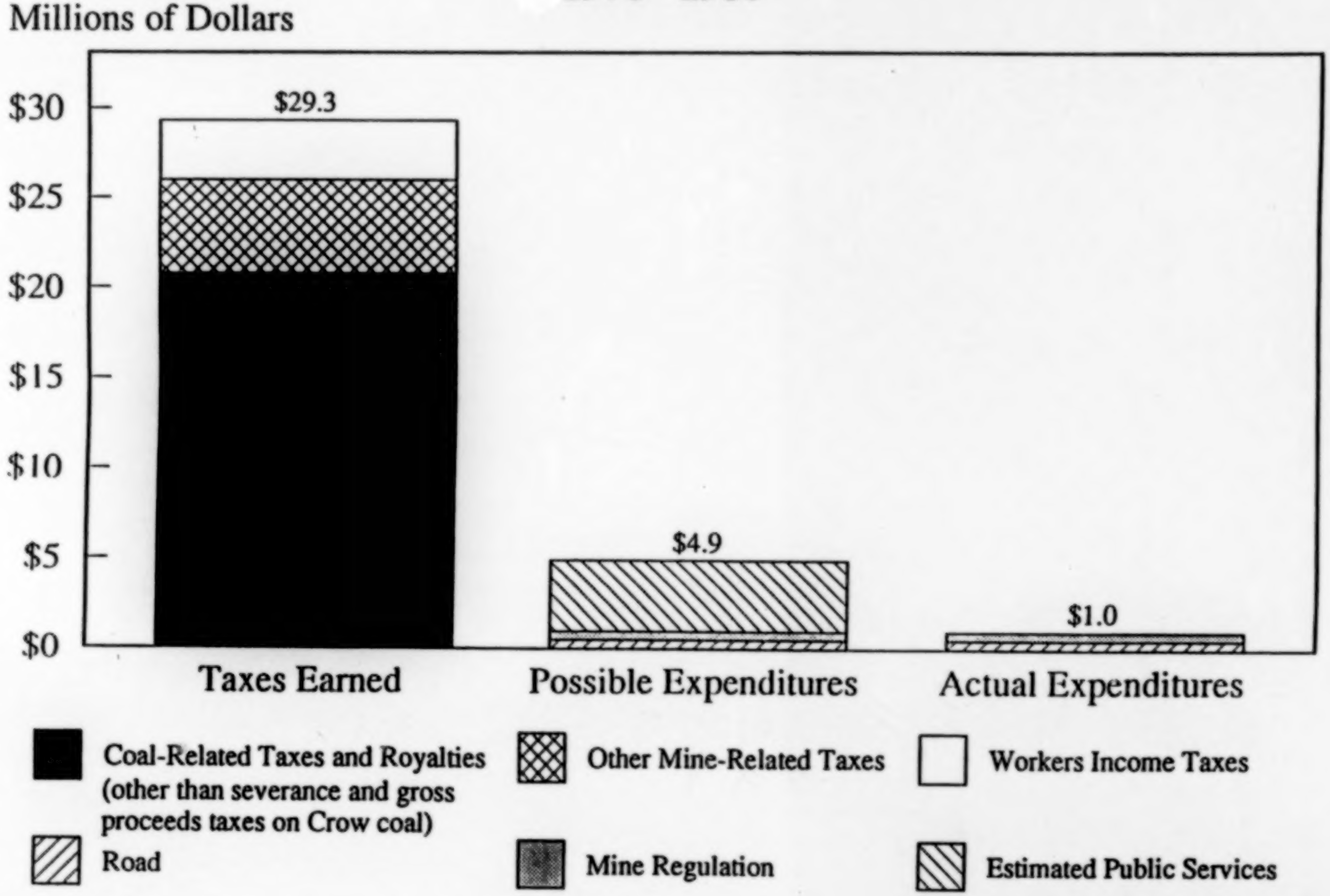
C. Report Organization

This report is organized in four sections following this introduction. Section II considers whether income to the State and County related to the Westmoreland mine are sufficient to cover state and local government costs

associated with the mine. Section III presents our estimate of the value today of Westmoreland's tax payments on Crow coal during the period 1975 to 1982 and gross proceeds tax payments from 1975 through November 1987. Section IV presents our determination of the economic damage to the Crow Tribe from the cancellation of the Shell contracts to sell Crow coal to two electric utilities. Section V examines the Crow Tribe's socioeconomic conditions and estimates the funding levels required to improve those conditions.

Revenue from the Westmoreland Mine Other than Severance and Gross Proceeds Taxes on Crow Coal Greatly Exceeded Required Government Services

1976 - 1986



nera

Figure 1.1

1994 VALUE OF SEVERANCE TAXES COLLECTED BY MONTANA CALCULATED BY USING THE MONTANA BOARD OF INVESTMENTS TIME-WEIGHTED RATES OF RETURN
1976-1993
(Assuming Middle of the Year Payments and Reinvestment of Interest)

Fiscal Year[1]	Interest Rate[2]	Severance Tax Paid[3]	Fund Balance[4]	Interest on Balance[5]	Interest on New Payments[6]	Cumulative Balance and Interest
(July-June)				(1)*(3)	(1)*[(2)/2]	(2)+(3)+(4)+(5)
	(1)	(2)	(3)	(4)	(5)	(6)
1976	6.68%	23,964,642	0	0	800,419	24,765,061
1977	16.20%	35,906,057	24,765,061	4,011,940	2,908,391	67,591,449
1978	-2.50%	34,372,065	67,591,449	(1,689,786)	(429,651)	99,844,077
1979	7.90%	42,689,164	99,844,077	7,887,682	1,686,222	152,107,145
1980	-1.80%	75,125,009	152,107,145	(2,737,929)	(676,125)	223,818,100
1981	-7.70%	70,415,074	223,818,100	(17,233,994)	(2,710,980)	274,288,200
1982	13.30%	86,186,846	274,288,200	36,480,331	5,731,425	402,686,802
1983	51.30%	80,044,981	402,686,802	206,578,329	20,531,538	709,841,650
1984	-1.50%	82,823,411	709,841,650	(10,647,625)	(621,176)	781,396,260
1985	38.10%	91,748,855	781,396,260	297,711,975	17,478,157	1,188,335,247
1986	21.60%	84,217,213	1,188,335,247	256,680,413	9,095,459	1,538,328,333
1987	7.80%	76,546,594	1,538,328,333	119,989,610	2,985,317	1,737,849,854
1988	6.50%	84,638,333	1,737,849,854	112,960,240	2,750,746	1,938,199,173
1989	14.10%	58,565,583	1,938,199,173	273,286,083	4,128,874	2,274,179,713
1990	9.20%	67,870,544	2,274,179,713	209,224,534	3,122,045	2,554,396,836
1991	12.70%	50,457,850	2,554,396,836	324,408,398	3,204,073	2,932,467,157
1992	14.60%	43,434,069	2,932,467,157	428,140,205	3,170,687	3,407,212,118
1993	10.83%	38,300,693	3,407,212,118	369,001,072	2,073,983	3,816,587,866
Totals		$1,127,306,983		$2,614,051,480	$75,229,403	$3,816,587,866
Westmoreland Payments and Interest on Crow Coal[7]		$46,811,029		$214,136,218	$1,753,963	$262,701,210
Remaining Value of Severance Taxes		$1,080,495,954		$2,399,915,262	$73,475,440	$3,553,886,656

Notes and Sources:

[1] Montana fiscal year is from July 1 to June 30 and tax year is from January 1 to December 31.
Taxes paid in each year are allocated half to that fiscal year and half to the following fiscal year.

[2] Time-weighted returns are based on *Fiscal Year Reports* for years 1976-1992 prepared by the Montana Board of Investments:
The interest rate for 1976 is based on the portfolio yields for the Trust and Legacy Fund.
For 1977-1981 the rates are based on the annualized time-weighted returns to the Trust and Legacy Fund.
For 1982-1992 the rates are based on the annualized time-weighted returns to the Coal Trust Fund.
The 1993 rate is the time-weighted total rate of return on the Permanent Coal Tax Trust obtained from the Montana State Board of Investments.

[3] Severance taxes are taken from Montana Tax Foundation, *Montana Taxation – 1992.*
The 1993 severance tax figure was obtained through personal communication with the Natural Resource & Corporation Tax Division of the Montana Department of Revenue.

[4] The fund balance is equal to the cumulative balance and interest from the previous year.

[5] Balance earns interest for a full year.

[6] Since new payments are not made until mid-year, they earn interest for only half a year.

[7] West Montana payments and interest on Crow coal are shown in Table 33.

Table 1.3

II. GOVERNMENT TAXES ON COAL ARE NOT REQUIRED TO COVER MINING RELATED GOVERNMENT COSTS

A. Introduction

In a previous study, NERA demonstrated that from 1976 through 1982 the revenues generated by the State of Montana and its local governments through taxation of coal mining operations were much greater than the increased state and local government expenditures associated with coal mining.[1] We have been asked to update our analysis through 1987 and to reexamine the impacts associated with the Absoloka Mine. Based on our review of more recent data, we have determined that governmental costs associated with coal mining in general and with Westmoreland Resource's Absoloka Mine in particular have been minimal and are more than sufficiently addressed with funds derived from taxes other than severance and gross proceeds taxes on Crow coal through 1987. Income and property taxes paid to state and local governments by Westmoreland Resources; the coal mine operator, Morris-Knudsen; and the employees of the mine as well as taxes and royalties from production of state coal greatly exceed the cost of the services required by the mine.

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[1] Mark P. Berkman and Frederick C. Dunbar, Expert Witness Report on Behalf of the United States and the Crow Tribe of Indians, *Crow Tribe of Indians and the United States of America v. State of Montana et al.*, January 6, 1984, Exhibit 42.

B. Big Horn County Did Not Experience the Boom Town Phenomenon

Concerns about fiscal impacts associated with natural resource development relate to the "boom towns" which occurred in several cities in the western United States during the increase in mining resulting from the Arab oil embargo of the early 1970s. Typically, boom towns are areas where a rural community is inundated with a migration of individuals who work at a newly developed energy facility, including coal and uranium mines and power plants. Often, the number of new workers and their families are several times the original population of the area. Natives of the area, as well as the newcomers, suffer because the existing infrastructure of local governments cannot accommodate the service demands of the suddenly large population. Financially strapped communities are forced to swallow the bitter pill of higher taxes as well as overcrowded schools and hospitals, inadequate sewers and roads, etc. While the boom town phenomenon debilitated some western communities as their natural resources were developed, it is clear that no such problems occurred as a result of the development of Westmoreland's Absoloka mine.

1. The Absoloka Mine Did Not Cause a Large Migration of Workers

Big Horn County became a major coal-producing county in the 1970s. As shown in Table 2.1, coal production grew from 800,000 tons in 1972 to 16,175,000 tons in 1980. The Table also demonstrates that other counties within the Powder River Basin including Rosebud

County, Montana, and Campbell County, Wyoming also experienced dramatic coal production growth.[2] Unlike the other coal counties, however, Big Horn County did not experience substantial population growth as a result of the growth in coal production. In fact, as shown in Table 2.2, Big Horn County's population grew at a much lower rate than the other coal counties. The County's population growth rate was even lower than for the State of Montana overall between 1970 and 1980 – 10.3 percent versus 13.3 percent.

What differentiates Big Horn County from the other coal counties is the lack of population migration associated with mining. The work force associated with the Absoloka mine has never been very large and the Crow Reservation provided a substantial underutilized work force for mining operations and any secondary employment opportunities. Coal mining in the county provided employment for some of the many residents of the Crow Reservation. In fact, of the individuals working at the Absoloka mine, 60 percent of hourly workers and 20 percent of supervisory workers are Crow Tribe members.[3] A 1975 study by Mountain West Research also suggested a small migration.[4] Only 30 percent of the mine

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[2] The Powder River Basin refers to a major coal-producing area located in Montana and Wyoming. For a more detailed definition, see U.S. Department of Energy, Energy Information Administration, *Coal Production 1985, Washington, D.C.: GPO, 1986, pp. 4-8.*

[3] Personal communication with Joseph Presley, President, Westmoreland Resources, April 19, 1993.

[4] Montana West Research North, Inc., *Environmental Baseline Studies for the Crow Indian Leases: Socio-Economic Report,* Billings, MT, 1975.

employees surveyed by Mountain West were new residents of Big Horn County. Mine employment at the other large mines located in Big Horn County – Decker and Spring Creek – also resulted in little population growth. Many of the workers at these mines live in nearby Sheridan, Wyoming (City and County).

In fact, the 1990 Census reports only 129 mining industry workers living in Big Horn County, despite the County's rank as one of the largest coal-producing counties in the Country. This figure represents only 3.6 percent of the total employed and 2 percent of all individuals between the ages of 18 and 64 living in the County.

It is also instructive to examine the racial breakdown of the population change in Big Horn County between 1970 and 1990. Table 2.2 shows that, while the population of non-Whites in the county increased by 58 percent during the 20-year period, the population of Whites decreased by nearly 18 percent from 1970 to 1990. The increased population of non-Whites, virtually all of whom are Native American, clearly is not related to coal mining.

2. State and Local Governments Have Benefited from Coal Production

The State of Montana has collected over $1.1 billion in severance tax revenues since 1975.[5] In addition, $206.5 million dollars has been collected in gross proceeds taxes since 1975 in order to support county government in the counties where mines are located. The state's resource

[5] Montana Coal Council, *Montana Coal*, 1993.

indemnity trust tax has collected another $19.5 million from all nonrenewable resource producers since 1973.[6] The State has benefited greatly from this revenue; one only has to look at the $497.6 million Constitutional Trust Fund to see this. Local governments, too, have benefited from revenue associated with coal production. Due to the increased tax base resulting from coal mining, the Big Horn County mill levy showed no discernible increase over the period since mining began in the county. In 1973, the mill levy in Big Horn County was 107.86; by 1987 the mill levy had decreased to 91.00.[7] During the same period, the Consumer Price Index rose 156 percent.

By comparison, other Montana counties with populations similar to Big Horn raised property tax rates over the same period. Further evidence of the financial health of Big Horn County is contained in the data regarding the School Equalization Foundation Program administered by the Montana Office of Public Instruction. Under this program, all school districts in Montana receive an equivalent amount of funding per student. In instances where tax collections do not meet this funding level, the State provides additional funding to the school districts. School districts where collections are greater than this average amount are obliged to contribute the excess amount to

[6] Montana Coal Council, 1993, for collections through fiscal year 1992. Fiscal year 1993 collections were obtained through personal communication with the Office Manager at the Montana Coal Council.

[7] The mill levies represent the County rates only. Additional levies for cities, elementary and high school districts, and special districts such as water and sanitation may also apply. For example, the total mill levy applied to the Westmoreland mine in Big Horn County in 1987 was 146.27.

the equalization fund.[8] During the period 1977 through 1987, as shown in Table 2.3, Big Horn County contributed up to 53.3 percent of its school property tax revenues (elementary and high school) to the State. Also note that these contributions equaled or exceeded Westmoreland's gross proceeds tax payments on Crow coal every year after 1980.[9]

C. Mine-Related Public Services Demands on State and Local Governments Have Been Minimal

The only public project associated with the Westmoreland mine has been the repaving of a road between Hardin and the mine. This project cost the State approximately \$0.5 million.[10] In addition, the State spent approximately \$0.4 million in administrative costs for the

[8] For a more detailed description of the equalization program, see Montana Legislative Council, "The Montana School Foundation Program and State Equalization Aid: A Legislative and Financial History, 1949-1991," April 1992.

[9] Big Horn County was one of only three counties (Fallon and Rosebud were the others) which contributed to the state equalization fund every year from 1979-80 to 1987-88. As a result of a successful legal challenge, the state modified the equalization program in 1990. Big Horn County was a net recipient of equalization funds, less than one percent of its foundation funding, in 1978-79.

[10] Total project costs were approximately \$2.4 million, but, federal funds for secondary highways financed 78 percent of this cost, oı \$1.9 million. This estimate is based upon the State's responses to question number 46 in Defendant's Answers to the Plaintiff's Fourth Set of Interrogatories and a Supplemental Response dated November 22, 1983.

regulation of the Westmoreland mine from 1973 to 1983.[11] In our previous report, we conservatively determined that employment at the Westmoreland mine had at most resulted in additional government services totaling \$322,000 annually or \$3.9 million over the disputed period.[12] As discussed above, however, there has been no significant population increase associated with the Absoloka mine and no public works projects other than the road to the mine have been identified as being mine related. In addition, since the mine created jobs in a area of high unemployment, the mine actually reduced the demand for some state and county service. Consequently, no increase in government services expenditures was caused by mining operations.

The Absoloka mine does not pose any future liability to Montana or to Big Horn County. No boom town has been created which may some day go bust. Future environmental costs to repair environmental damage are highly unlikely. The Absoloka mine is closely monitored and regulated at the federal, state and tribal levels and has not been a source of environmental problems. Twice monthly state inspections have resulted in only a limited

[11] This is Montana's estimate of its total cost for regulating coal mining on the ceded strip (the location of the Westmoreland mine) from 1973 to 1983. Adding the average annual cost of regulation for the years 1984 through 1986 would bring the total to \$509,091 for the 14 year period 1973 to 1986. Adding this expense to the state's contribution to the road construction brings the total state expenditure to approximately \$1.0 million through 1986. *Crow Tribe of Indians and United States of America v. State of Montana et al*, 1984. (Ex. D-383.)

[12] M. Berkman and F. Dunbar, 1983, p.II-16.

number of minor environmental citations to Westmoreland since mining began at the Absoloka mine.[13] Montana has an impressive record regarding environmental protection at its mines. According to the United States Department of the Interior, only 192 of nearly 140,000 violations of the Surface Mining Control and Reclamation Act (SMCRA) regulations between 1977 and 1992 were recorded in Montana.[14] Montana also requires a company to post a bond sufficient to cover the cost of reclamation before it is permitted to mine in the State.[15] The bond is not released until the reclamation is completed. The State also receives taxes and federal funds to cover future environmental damage. The resource Indemnity tax is collected by the State for the express purpose of funding future environmental remediation. In addition, the State also receive half of the SMCRA tax imposed by the U.S. Government on state coal mined by Westmoreland to cover mine-related environmental problems.

[13] Personal communication with Joseph Presley, President, Westmoreland Resources, Inc., April 19, 1993.

[14] U.S. Department of the Interior, "Surface Coal Mining Reclamation: 15 years of Progress, 1977-1992," August 3, 1992.

[15] SMCRA mandates that mine operators must post a performance bond "sufficient to the cost of reclaiming the site in the event that the operators fail to complete reclamation," U.S. Department of Interior, August 3, 1992.

D. Revenue from the Westmoreland Mine Is Substantial Without Severance and Gross Proceeds Taxes on Crow Coal

Even in the absence of severance and gross proceeds taxes on the Crow coal mined by Westmoreland Resources, Montana collects substantial tax revenues and royalties from the mine. Over the period 1976 through 1986, during which the disputed taxes were paid, the State collected approximately $29.3 million in taxes and royalties from Westmoreland's state coal production as well as other taxes. As shown in Table 2.4, Montana collected severance and gross proceeds taxes and royalties on state coal produced by Westmoreland. Over the period 1979 through 1986 Westmoreland's state coal production generated approximately $17.2 million from these taxes and $1.4 million in royalties. Montana also receives tax revenues from all coal produced by Westmoreland *including Crow coal*. These revenues come from the State's Resource Indemnity Trust tax which generated $0.8 million over the disputed period. In addition, the SMCRA tax generated $1.4 million from the production of State coal over the disputed period. Montana and Big Horn County also obtained revenues from income and property taxes on the mine owners, operators and workers. For example, Westmoreland income and property taxes associated with the mine and property taxes on the mine's contractor, Morrison-Knudsen, totalled over $5 million.[16] The State also received income taxes from the workers at the mine and the secondary workers associated with the

[16] We were unable to determine whether Morris Knudsen paid income tax to the State for its Westmoreland operations.

economic activity of the mine. These taxes totalled approximately $3.3 million from 1976 to 1986, based on employment at the mine, average miner salary and tax rate, and the multiplier effects of mine employment. The determination of this value is summarized in Table 2.5. As shown in the table, miner income tax revenues totaled $1.89 million over the period based on average Montana miner salaries as reported by the Montana Coal Council, the number of miners reported by Westmoreland and the Montana average state income tax rates derived from the *All States Tax Handbook*.[17] Income tax revenues from secondary workers totaled $1.43 million over the period. The number of secondary workers used to establish this value was determined by applying an employment multiplier for Montana prepared by the U.S. Department of Commerce.[18] Secondary worker income was based on average Montana salaries as reported in the U.S. Census. The same income tax rates were applied.

E. Revenues From the Westmoreland Mine Other Than Gross Proceeds and Severance Taxes on Crow Coal Greatly Exceed Mine-Related Governmental Costs

Montana and Big Horn County revenues from the Westmoreland mine excluding severance and gross

[17] Westmoreland employment for 1984-1986 was estimated based on production and miner productivity.

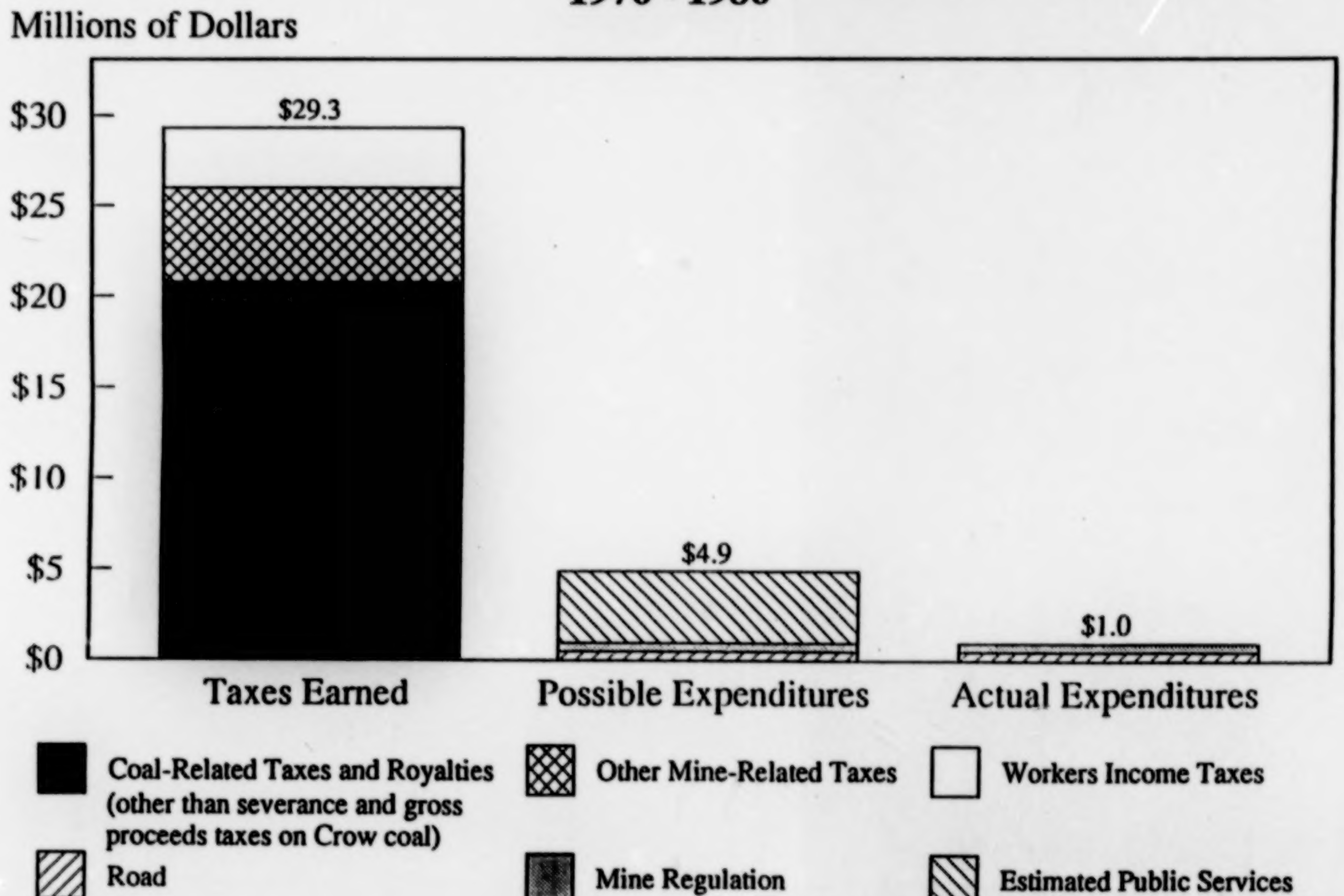
[18] U.S. Department of Commerce, Economic and Statistics Administration, Bureau of Economic Analysis, "Regional Multipliers: A User Handbook for the Regional Input-Output Modeling System (RIMS II)," Washington, D.C.: GPO, Second Edition, May 1992.

proceeds taxes on Crow Coal exceeded mine related government expenses by over $20 million. This is true even if we include our previous estimate for annual governmental expenses for new miners.[19] Mine related income and property taxes alone cover government costs associated with the Westmoreland mine. Figure 2.1 illustrates the substantial disparity between these revenues and the mine-related government expenditures.

[19] Berkman and Dunbar, 1983.

Revenue from the Westmoreland Mine Other than Severance and Gross Proceeds Taxes on Crow Coal Greatly Exceeded Required Government Services

1976 - 1986



nera

Figure 2.1

Table 2.1

COAL PRODUCTION FOR MONTANA AND WYOMING AND SELECTED COUNTIES
1972 - 1992

Year	Montana (1)	Big Horn County (2)	Rosebud County (3)	Wyoming (4)	Campbell County (5)	Sheridan County (6)
	Thousand Tons					
1972	8,200	800	7,900			
1973	10,724	4,200	6,300	14,886	1,623	463
1974	14,106	8,315	5,440	20,702	4,051	1,023
1975	22,054	13,200	8,500	23,805	N/A	N/A
1976	26,231	14,900	11,700	30,836	N/A	N/A
1977	27,226	14,769	12,114	46,028	17,450	2,395
1978	26,600	13,620	12,652	58,328	29,204	2,861
1979	32,676	18,131	14,191	71,523	41,046	3,524
1980	29,948	16,175	13,392	94,968	61,471	4,287
1981	33,545	19,556	13,721	102,969	71,723	2,736
1982	27,882	15,336	12,341	108,360	81,224	3,002
1983	28,924	16,559	12,143	112,213	88,160	2,920
1984	33,000	16,880	15,858	130,914	106,811	2,531
1985	33,286	17,313	15,740	140,711	113,972	2,363
1986	33,978	18,820	14,897	136,820	111,638	1,359
1987	34,399	18,810	15,297	146,849	122,335	1,188
1988	38,881	18,711	19,929	164,014	135,975	945
1989	37,742	20,044	17,395	171,558	143,865	111
1990	37,616	20,852	16,400	184,249	154,832	119
1991	38,227	20,820	17,124	193,854	165,024	158
1992	38,879	22,055	16,577	190,169	159,726	71
Production Growth (1973 - 1981)	212.8%	365.6%	117.8%	591.7%	4319.2%	490.9%
Production Growth (1973 - 1992)	262.5%	425.1%	163.1%	1177.5%	9741.4%	-84.7%

Sources: U. S. Department of Energy, Energy Information Administration, *Coal Production*, 1976 - 1992. U. S. Department of the Interior, *Mineral Industry Surveys*, 1973 - 1975. *Keystone Coal Industry Manuals*, 1972 - 1976.

POPULATION GROWTH IN MONTANA, BIG HORN COUNTY AND OTHER COAL PRODUCING COUNTIES

1970 - 1990

Jurisdiction	1970	1980	1990	Percent Change 1970 - 1980	1980 - 1990	1970 - 1990
	(1)	(2)	(3)	(4) (2)/(1)	(5) (3)/(2)	(6) (3)/(1)
Montana	694,409	786,690	799,065	13.3%	1.6%	15.1%
Big Horn County	10,057	11,096	11,337	10.3%	2.2%	12.7%
Hardin	2,733	3,300	2,940	20.7%	-10.9%	7.6%
Big Horn						
White	6,018	5,781	4,939	-3.9%	-14.6%	-17.9%
Non-White	4,039	5,315	6,398	31.6%	20.4%	58.4%
Other Coal Counties						
Rosebud, MT	6,032	9,899	10,505	64.1%	6.1%	74.2%
Campbell, WY	12,957	24,367	29,370	88.1%	20.5%	126.7%
Sheridan, WY	17,852	25,048	23,562	40.3%	-5.9%	32.0%

Source: U. S. Bureau of the Census, *Census of Population and Housing, 1970, 1980 and 1990.*

Table 2.2

Table 2.3

BIG HORN COUNTY CONTRIBUTED TO THE MONTANA SCHOOL EQUALIZATION PROGRAM
1977 - 1987

Fiscal Year[1]	Big Horn County Collections (1)	Amount Recaptured by State (2)	Percent Recaptured by State (3) (2)(3)
1977 - 78	2,161,711	235,957	10.9%
1978 - 79	2,363,552	(18,391)	-0.8%
1979 - 80	2,986,553	463,817	15.5%
1980 - 81	4,982,786	2,445,952	49.1%
1981 - 82	6,348,892	3,383,919	53.3%
1982 - 83	5,090,451	1,799,188	35.3%
1983 - 84	5,376,735	1,932,999	36.0%
1984 - 85	5,810,583	2,166,916	37.3%
1985 - 86	5,681,261	1,868,227	32.9%
1986 - 87	5,565,087	1,719,375	30.9%
1987 - 88	5,067,324	1,295,793	25.6%

[1] Montana fiscal year is from July 1 to June 30 and tax year is from January 1 to December 31. Taxes paid in each year are allocated half to that fiscal year and half to the following fiscal year.

ESTIMATED STATE AND COUNTY REVENUES FROM THE WESTMORELAND MINE OTHER THAN TAXES RECEIVED FROM INDIAN COAL 1976 - 1986

Tax	1976	1977	1978	1979	1980	1981	1982	1983	1984	1985	1986	Total
Coal Related												
Severance (State Coal)[1]	0	0	0	880,246	3,329,220	2,212,313	107,777	2,123,272	2,303,235	2,393,097	1,504,722	14,853,882
Gross Proceeds (State Coal)[2]	0	0	0	0	147,458	555,510	346,918	90,193	339,746	368,216	477,981	2,326,022
Royalties (State Coal)[3]	0	0	0	102,452	350,374	196,577	41,243	179,333	194,818	195,693	135,860	1,396,348
Resource Indemnity Tax (All Coal)[4]	51,819	63,621	64,220	73,707	82,507	86,078	86,105	91,611	87,027	68,873	63,477	819,045
SMCRA (State Coal)[5]	0	0	0	102,452	350,374	196,577	41,243	179,333	194,818	195,693	135,860	1,396,348
												20,791,646
Other Mine Related												
Westmoreland Income Taxes[6]	135,698	135,698	92,275	213,204	2,663	173,769	196,577	135,698	135,698	135,698	135,698	1,492,674
Westmoreland Non-Coal Property Taxes[7]	45,834	48,843	151,621	145,197	390,616	349,326	273,491	265,047	244,806	217,880	244,478	2,377,140
Morrison-Knudsen Property Taxes[8]	78,007	81,630	163,119	167,354	262,947	127,019	105,644	74,687	87,812	76,716	76,890	1,301,824
												5,171,637
Mine Workers[9]												
Miners Income Taxes	100,419	149,027	170,715	202,693	214,558	224,856	168,911	164,251	166,333	167,067	164,888	1,893,718
Secondary Income Taxes	76,064	112,883	129,310	153,533	162,520	170,320	127,944	124,414	125,991	126,548	124,897	1,434,424
												3,328,142
TOTALS	487,841	591,701	771,260	2,040,838	5,293,236	4,292,344	1,495,854	3,427,838	3,880,285	3,945,479	3,064,750	29,291,426

Years are Montana tax years, from January 1 to December 31. Taxes are paid in subsequent fiscal years, which are from July 1 to June 30.

Sources and Notes:

[1] Severance taxes are from Attachment A to State's responses to Fifth Set of Interrogatories, *Crow Tribe of Indians v. State of Montana* and information provided by Westmoreland Resources.

[2] Gross proceeds taxes are from Attachment NN to State's Second Supplemental Response to Fifth Set of Interrogatories, *Crow Tribe of Indians v. State of Montana.*

[3] Royalties are equal to $0.175 per ton of production on state lands.

[4] Resource indemnity tax is equal to 0.4% of the market value of coal sales; 1976 - 1982 values are from 1983 NERA expert report - Table 8, p. 1-13. Remaining years are estimated.

[5] State earns half the Surface Mining Control and Reclamation Act (SMCRA) tax of $0.35 per ton of coal mined on state lands.

[6] Westmoreland income taxes for 1976 to 1982 are taken from 1983 NERA expert report – Table 8, p. 1-13. Remaining years are estimated.

[7] Westmoreland property taxes are from Attachment JJ to State's Second Supplemental Response to Fifth Set of Interrogatories, *Crow Tribe of Indians v. State of Montana.*

[8] Morrison-Knudsen property taxes are from Attachment KK to State's Second Supplemental Response to Fifth Set of Interrogatories, *Crow Tribe of Indians and v. State of Montana.* Morrison-Knudsen income taxes were not available.

[9] NERA calculations based on mine employment and average income of Westmoreland Resources, an average Montana income tax rate as found in Research Institute of America, *All State Tax Handbook,* and secondary employment as determined by U.S. Department of Commerce, Regional Input-Output Modeling System.

Table 2.4

IN UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
BILLINGS DIVISION

THE CROW TRIBE OF INDIANS, Plaintiff, and UNITED STATES OF AMERICA, Plaintiff-Intervenor vs. STATE OF MONTANA; MICHAEL J. ROBINSON, Director, Montana Department of Revenue; BIG HORN COUNTY, Montana; MARTHA FLETCHER, Treasurer, Big Horn County, Montana, Defendants.	No. CV-78-110-BLG-JDS **FINAL PRE-TRIAL ORDER (Amended 4/4/94)**

The Court hereby enters the following amended Final Pretrial Order pursuant to Local Rule 235-6.

* * *

IV. AGREED FACTS[1]

A. Plaintiff Crow Tribe of Indians is a sovereign American Indian Tribe, with a governing body, the Crow Tribal Council, duly recognized by the United States Secretary of the Interior as the governing body of the Crow Indian Reservation.

[1] The parties reserve the right to contest the relevance or materiality of any of the following Agreed Facts.

B. Defendant State of Montana is a sovereign state of the Union, admitted pursuant to the Enabling Act of February 22, 1889, 22 Stat. 676.

C. Defendant Michael J. Robinson is Director of the Montana Department of Revenue. He is sued in his official capacity.

D. Defendant Big Horn County, Montana, is a political subdivision of Montana. Most of the Crow Indian Reservation and of the Crow Tribe's coal resources are encompassed within the exterior boundaries of Big Horn County.

E. Defendant Martha Fletcher is Treasurer of Big Horn County. She is sued in her official capacity.

F. Defendants Robinson and Fletcher are the State and County officials charged under Montana law with the enforcement and collection of Montana's coal severance and gross proceeds taxes.

G. Plaintiff-intervenor United States holds in trust, and the Tribe is the beneficial owner of, large amounts of coal resources underlying the Crow Indian Reservation and the ceded strip. In *Crow II, supra,* the Court of Appeals held that the tribally owned coal within the ceded strip is part of the Crow Indian Reservation. The United States supervises the development of the Tribe's mineral resources through the Department of the Interior and the Bureau of Indian Affairs.

H. The Tribe granted coal prospecting permits to, and entered into coal leases with, several mining companies which were approved by the Secretary of the Interior.

I. On September 16, 1970, Westmoreland Resources, Inc. was the successful bidder at a sale of prospecting permits covering tribal coal underlying approximately 34,000 acres in the ceded strip. On June 6, 1972, Westmoreland and the Tribe executed two leases embracing the coal underlying approximately 31,000 acres of that land. The two leases were approved by the Department of the Interior on June 14, 1972 pursuant to the Indian Mineral Leasing Act of 1938, 25 U.S.C. §§396a-396g. The leases were amended on November 26, 1974. One of the leases, which encompassed approximately 16,000 acres, was subsequently terminated on February 16, 1982 by mutual consent of the Tribe and Westmoreland with the approval of the Interior Department on March 25, 1982.

J. In the early 1970s, the Crow Tribe granted coal prospecting permits to AMAX, Gulf and Peabody coal companies and entered into a coal lease with AMAX. The permits and lease were approved by the Bureau of Indian Affairs. The permits and the AMAX lease have lapsed. No coal production took place.

K. On April 22, 1968 the Department of the Interior approved a mineral prospecting permit between the Crow Tribe and Shell Oil Company. On June 8, 1972, the Department of the Interior approved a coal lease between the Tribe and Shell Oil Company under the Indian Mineral Leasing Act of 1938 with respect to the coal underlying approximately 30,000 acres of land within the Reservation's exterior boundaries. On December 16, 1974, Shell executed a contract for the sale and purchase of coal with Cajun Electric Power Cooperative, Inc., which coal was to be mined from a proposed facility, to be known as the Youngs Creek mine, located within the area leased

from the Tribe. On January 23, 1975, Shell entered into a contract for the sale and purchase of coal with Houston Lighting and Power Company, which coal also was to be mined from the Youngs Creek mine. The contract with Cajun Electric was canceled by mutual agreement on February 23, 1981 and the contract with Houston Lighting and Power was canceled by mutual agreement on March 16, 1981.

L. On January 3, 1976, the Tribe filed suit against, *inter alia,* Shell seeking to invalidate the 1972 coal lease. *Crow Tribe v. Kleppe,* No. CV-76-10-BLG (D. Mont.). On May 17, 1978 the District Court entered an order determining the lease was defective because of a failure to comply with 25 C.F.R. §171.9(b). Judgment was entered on May 19, 1978 consistent with such determination. The litigation continued with respect to other grounds upon which the Tribe challenged the lease's validity.

M. On May 8, 1980, the Tribe and Shell entered into a new mining agreement which superseded the 1972 coal lease. The 1980 agreement applied to the coal underlying 2560 acres within the Reservation, including the land where the Youngs Creek mine was to be constructed. It also included options for mining Crow coal underlying other lands within the Crow Indian Reservation. The agreement was approved by the Department of the Interior pursuant to the Indian Mineral Development Act of 1982, 25 U.S.C. §§2101-2108, on April 1, 1983. The 1980 agreement provided that, upon Departmental approval, dismissal of the Tribe's claims in No. CV-76-10-BLG (D. Mont.) against Shell and the latter's counterclaims against the Tribe would be requested, and such dismissal

was entered on September 9, 1983. On December 30, 1985, Shell relinquished its rights under the 1980 agreement.

N. Westmoreland has been the only producer of tribal trust coal to date. Its facility is known as the Absaloka mine.

O. In 1975, the Montana Legislature enacted statutes which impose two taxes on coal mine operators in Montana, a severance tax and a gross proceeds tax, on each ton of coal produced and sold. Mont. Code Ann. §§15-35-101 through 15-35-111 and 15-23-701 through 15-23-704.

P. The Montana coal severance tax, Mont. Code Ann. §15-35-103, is "imposed on each ton of coal produced in the State." There are no exceptions for coal owned by Indian tribes or located within Indian reservations. The tax is measured by the value of the "contract sales price" of the coal, which is defined as "the price of coal extracted and prepared for shipment f.o.b. mine, excluding that amount charged by the seller to pay taxes paid on production." Mont. Code Ann. §15-35-102. The tax applied to production occurring after June 30, 1975.

Q. The rate of Montana's severance tax has varied depending on such factors as the time the coal was produced, its heating quality and whether it was extracted through surface or underground mining. At all relevant times, the coal mined by Westmoreland was taxed at the rate of thirty percent.

R. In 1987, the Montana Legislature reduced the coal severance tax to 25 percent for production during fiscal years 1989 and 1990, to 20 percent for production

during fiscal year 1991, and to 15 percent for production during fiscal year 1992 or thereafter if the Montana Department of Revenue certified by October 1, 1988 that the coal tonnage produced in Montana during fiscal year 1988 exceeded 32.2 million. 1987 Mont. Laws Chapt. 608. The Department so certified, and the reductions took effect. The current Montana severance tax rate is 15 percent of the contract sales price. See Mont. Code Ann. §15-35-103 (1991).

S. In 1985, the Montana Legislature enacted a new coal production incentive credit of 33¹/₃ percent to be applied against any severance tax otherwise due with respect to any incremental production produced and sold during calendar years 1985 and 1986. 1985 Mont. Laws Chapt. 636. New coal production incentive credits also were authorized in subsequent legislation for incremental production produced for periods through June 30, 1991. 1987 Mont. Laws Chapt. 609, §5 (50 percent credit for incremental production sold after December 31, 1986 and before July 1, 1988; 40 percent credit for incremental production sold after June 30, 1988 and before July 1, 1990); 1989 Mont. Laws ch. 31, §3 (25 percent credit for incremental production sold after June 30, 1990 and before July 1, 1991); *see* Mont. Code Ann. §§15-35-201 to -205 (1991).

T. The gross proceeds coal tax is imposed on "each person engaged in mining coal." Mont. Code Ann. §15-23-701. There are no exceptions for coal owned by Indian tribes or located within Indian Reservations. Each person mining coal must file with the State Department of Revenue an annual report that must include, *inter alia*, a statement of the number of "tons of coal extracted, treated, and sold from the mine during the taxable period" and "the gross yield or value in dollars and cents derived from the contract sales price." Mont. Code Ann. §15-23-701. The Department of Revenue transmits the valuation of the gross proceeds of the mine to the county assessor of each county in which the coal mines are located. Mont. Code Ann. §15-23-702. The county assessor then enters the value on an assessment roll, Mont. Code Ann. §15-23-702, and transmits a tax assessment to the county treasurer, who collects the taxes due from the coal operator. Mont. Code Ann. §15-23-703.

U. As enacted in 1975, the amount of the gross proceeds tax was equal to the number of mills levied for general property tax purposes by the county where the production occurred multiplied by the contract sales price of the production occurring during the particular fiscal year. The tax rate varied from time to time and from county to county but added roughly another 5% to the coal producers' tax bills on an annual basis. The gross proceeds tax became effective with respect to production occurring after June 30, 1975. In 1989, the Montana Legislature modified the gross proceeds tax rate to 5 percent of the contract sales price for production occurring after June 30, 1989. *See* 1989 Mont. Laws Chapt. 11, §77 (June 1989 Spec. Sess.) Mont. Code Ann. §15-23-703(1) (1991).

V. A portion of severance tax payments for coal production between July 1, 1975 and December 31, 1983 was allocated for current expenditures. Among other things, severance tax revenues have been used for the State's general fund, state equalization aid to public schools, coal area highway improvements, archaeological preservation, various cultural projects, alternative energy

research, general funds of the counties where the coal is mined, county land planning, and for a sinking fund servicing renewable resource development bond accounts. Mont. Code Ann. §15-35-108.

W. A portion of coal severance tax payments was allocated to three trust funds whose corpus was unavailable for current expenditure during that period but whose income and interest were available for expenditure. The proportion of the trust fund allocation and the trust funds to which the allocation was made were:

(1) Between July 1, 1975 and June 30, 1977, 10 percent of total collections was allocated to the education trust fund account; between July 1, 1977 and June 30, 1979, 7.5 percent was allocated to this trust; between July 1, 1979 and December 31, 1979, 15 percent was allocated to this trust; and between January 1, 1980 and December 31, 1983, 10 percent was allocated to this trust. *See* 1975 Mont. Laws Chapt. 502, §§3, 7; 1977 Mont. Laws Chapt. 540, §3; 1979 Mont. Laws Chapt. 653, §1. All monies in this fund as of June 30, 1990 were appropriated to the Superintendent of Public Instruction for school equalization payment purposes during fiscal year 1991. 1989 Mont. Laws Chapt. 11, §95 (June 1989 Spec. Sess.).

(2) Between July 1, 1975 and June 30, 1977, 1.25 percent of total revenues was allocated to the fish, wildlife and parks-arts council trust fund; between July 1, 1977 and June 30, 1979, .9375 percent was allocated to this fund; between July 1, 1979 and December 31, 1979, 3.75 percent was allocated to this fund; and between January 1, 1980 and December 31, 1983, 2.5 percent was allocated to this trust fund. See 1975 Mont. Laws Chapt. 502, §3;

1977 Mont. Laws Chapt. 549, §1; 1979 Mont. Laws Chapt. 653, §1; 1983 Mont. Laws Chapt. 281, §3.

(3) Between July 1, 1977 and December 31, 1979, 25 percent of total revenue was allocated to the coal severance tax trust fund established under Mont. Const. Art. IX, §5; and between January 1, 1980 and December 31, 1983, 50 percent was allocated to this Constitutional trust fund. *See* 1977 Mont. Laws Chapt. 540, §1.

X. The Constitutional trust fund contains only coal severance tax monies paid by Montana producers. The principal of the fund may only be invaded on a three-fourths vote of the Montana Legislature. The Montana Legislature may appropriate, and has appropriated, the interest and income earned by the fund. As of June 30, 1993, the book value of the Constitutional trust fund was $505,977,318.

Y. The Crow Tribe enacted a Coal Taxation Ordinance in January 1976 imposing a 25 percent tax on the contract value of all coal mined within the Reservation's exterior boundaries and of coal beneficially owned by the Tribe within the ceded strip. The taxation code was subject to review by the Department of the Interior under article VI, section 10 of the Tribe's Constitution and By-laws. In February 1977, the Department's Acting Commissioner of Indian Affairs approved the code for application within the exterior boundaries of the Reservation but withheld approval with respect to coal production within the ceded strip based on a limitation in the Tribe's Constitution.

Z. By agreement dated July 10, 1982, which was approved by the Interior Department on September 29,

1982, Westmoreland agreed to pay the Tribe amounts equal to Montana's severance and gross proceeds taxes less any amounts of those taxes paid to Montana and to Big Horn County.

AA. The Tribe has not demanded that Westmoreland pay the tax obligations allegedly imposed under the Tribe's 1976 code. In April 1993, the Crow Tribe filed a motion for leave to file its Fifth Amended Complaint. In its proposed Complaint, the Tribe asserted a claim against Westmoreland for recovery of the taxes due under the Tribe's 1976 Coal Taxation Ordinance for the period prior to September 1982 if and to the extent that the Tribe does not recover in this action the severance and gross proceeds taxes on Crow coal that Westmoreland paid to Montana and Big Horn County during that period. The Crow Tribe has not otherwise requested tax payments from Westmoreland pursuant to the 1976 code.

AB. For the period between July 1, 1975 and December 31, 1982, Westmoreland paid severance taxes to Montana with respect to coal held in trust for the Tribe by the United States in the following amounts (by fiscal year) and with the following allocations to the trust funds described in paragraph W above (by fiscal year):

Year	Tax Amount	Coal Trust	Educ. Trust	FWP Trust
1976	$ 5,282,763.01	$	$ 528,276.30	$ 66,034.54
1977	5,834,899.75		583,489.98	72,936.25
1978	6,720,489.48	1,680,122.37	504,036.71	63,004.59
1979	6,987,988.94	1,746,997.24	524,099.17	65,512.40
1980	5,778,393.90	2,046,023.88	236,562.19	59,140.54
1981	5,852,067.73	2,926,033.87	585,206.77	146,301.69
1982	7,714,644.08	3,857,322.04	771,464.41	192,866.10
1983	2,639,781.65	1,319,890.83	263,978.17	65,994.54
Totals	$46,811,028.54	$13,576,390.23	$3,997,113.70	$731,790.65

Additional amounts reverted to the education trust fund from another account, known as the local impact fund account, during fiscal years 1977 through 1983.

AC. For the period between July 1, 1975 and December 31, 1987, Westmoreland paid gross proceeds taxes to Big Horn County with respect to coal held in trust for the Tribe by the United States in the following amounts by calendar year:

Year	Tax Amount
1975	$ 124,227.31
1976	787,849.87
1977	919,469.69
1978	1,076,494.88
1979	1,153,727.54
1980	1,205,139.87
1981	863,312.12
1982	1,086,733.89
1983	1,422,458.46
1984	1,026,286.10
1985	871,323.90
1986	892.090.63
Total	$11,429,114.26

All gross proceeds tax revenue received by Big Horn County was allocated for current expenditures as authorized or required by Mont. Code Ann. §15-23-703, *et seq.* Allocation of gross proceeds revenue for fiscal years 1975 through 1986 was as follows:

State of Montana	$ 674,888.74
Big Horn County	3,060,345.17
School District 17-H	2,609,119.49
County-Wide Schools	5,004,344.80
Cemetery District No. 1	77,972.41
County Planning	2,443.65

Big Horn County transferred a portion of the sum of $5,004,344.80, above-designated as "County-Wide Schools" to the State of Montana for recapture by the State for placement in its school equalization account.

AD. Westmoreland did not initiate appropriate proceedings under Montana law to recover, or otherwise secure a refund of, the severance and gross proceeds taxes paid to Montana and Big Horn County based on the production of Crow coal.

AE. Montana, Big Horn County and Westmoreland entered into an agreement providing for the settlement and dismissal with prejudice of Westmoreland's cross-claim against Montana and Big Horn County contained in its responsive pleading to the Tribe's Third Amended Complaint. Under that agreement, Westmoreland waived and/or disclaimed any claim of entitlement to a refund of severance and gross proceeds taxes paid between, and including, calendar years 1974 and 1987 with respect to ceded strip production pursuant to its lease with the Tribe. The agreement was executed on September 6, 1991.

AF. Westmoreland deposited severance tax payments in the amount of $23,404,483.74 into the District Court Registry pursuant to the Court's Order dated January 4, 1983 and gross proceeds tax payments in the amount of $536,475.06 into that Registry pursuant to the Court's Order dated November 25, 1987.

AG. Westmoreland has not paid any taxes to the Tribe pursuant to the Tribe's 1976 Coal Tax Ordinance. Pursuant to the September 1982 lease amendment, Westmoreland has paid the Tribe amounts equal to the State

severance tax obligations of Westmoreland for the period commencing July 1, 1982 through the present. Pursuant to the September 1982 lease amendment, Westmoreland also has paid the Tribe amounts equal to the State gross proceeds tax for the period commencing with the gross proceeds tax payment due to Big Horn County in November 1987 through the present.

AH. According to the 1990 Census, the unemployment rate for Native Americans on the Crow Reservation was 44% as compared to 6% for non-Indians in Montana and 3.3% for non-Indians in Big Horn County. Per capita annual income for Native Americans on the Crow Reservation was $4,243 while non-Indians in Big Horn County earned $10,717 per year on a per capita basis. From 1979 to 1989, per capita income measured on a constant dollar basis increased by 17 percent for non-Indians in Big Horn County while real per capita income of Native Americans in Big Horn County fell by 11% over the same period. Fifty percent of the Native Americans on the Crow Reservation are living in poverty as compared to 13% of the non-Indians living in Big Horn County. From 1980 to 1990, the percentage of Native Americans in Big Horn County living below the poverty line increased from 32% to 53%.

IN UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
BILLINGS DIVISION

THE CROW TRIBE OF INDIANS, Plaintiff, and UNITED STATES OF AMERICA, Plaintiff-Intervenor vs. STATE OF MONTANA; MICHAEL J. ROBINSON, Director, Montana Department of Revenue; BIG HORN COUNTY, Montana; MARTHA FLETCHER, Treasurer, Big Horn County, Montana, Defendants, and WESTMORELAND RESOURCES, INC., Defendant-Intervenor	No. CV-78-110-BLG-JDS **FINAL PRE-TRIAL ORDER (Amended 4/4/94)**

The Court hereby enters the following amended Final Pretrial Order pursuant to Local Rule 235-6.

VII. POINTS OF LAW

* * *

C. Whether the violations by Montana and Big Horn County of the Indian Mineral Leasing Act and of

the sovereign rights of the Crow Tribe give rise to one or more of the following causes of action:

a. recovery through restitution of the illegal taxes imposed and collected by Montana and Big Horn County;

b. damages owing to the unlawful interference with the business and contractual relationships between the Crow Tribe and the Shell Oil Company;

c. recovery through restitution of revenues received by Montana and Big Horn County as a result of their violation of the Indian Mineral Leasing Act or the sovereign rights of the Crow Tribe or of their interference with the business and contractual relationships between the Crow Tribe and the Shell Oil Company.

1. *Tribe's and United States' Position.* It has already been conclusively established that Montana and Big Horn County violated the Indian Mineral Leasing Act of 1938 and the sovereign rights of the Crow Tribe by imposing and collecting their illegal severance and gross proceeds taxes on Crow coal. These violations of federal law give rise to whatever remedies are necessary and appropriate to redress those wrongs, to fulfill the Indian Mineral Leasing act and the Tribe's sovereign rights, to restore the Tribe to the position it would have occupied if the violations had not occurred and to deprive the wrongdoers of any gains from their illegal acts. *Franklin v. Gwinnett County Public Schools,* ___ U.S. ___, 112 S. Ct. 1032, 117 L. Ed. 2d 208, 216-220 (1992) (the availability of all appropriate remedies to redress violations of federal law is presumed unless Congress has expressly indicated otherwise); *County of Oneida v. Oneida Indian Nation,* 470

U.S. 226, 233-240 (1985); *Washington v. Fishing Vessel Ass'n.*, 443 U.S. 658, 696 (1979); *Swann v. Charlotte-Mecklenburg Bd. of Education*, 402 U.S. 1, 15 (1971) ("Once a right and a violation have been shown, the scope of a district court's equitable powers to remedy past wrongs is broad, for breadth and flexibility are inherent in equitable remedies"); *Bangor Punta Operations v. Bangor & Aroostoock Railroad Co.*, 417 U.S. 703, 711 (1974) (shareholders should not be allowed to reap a profit from wrongs done to others); *R.H. Stearns Co. v. United States*, 291 U.S. 54, 61-62 (1934) ("no one shall be permitted to found any claim upon his own inequity or take advantage of his own wrong"); *Frank Music Corp. v. Metro-Goldwyn-Mayer, Inc.*, 886 F.2d 1545, 1552 (9th Cir. 1989) (purpose of the unjust enrichment remedy is to deprive the defendant of his ill-gotten gains); *Northwest Environmental Defense Center v. Gordon*, 849 F.2d 1241, 1244 (9th Cir. 1988); December 26, 1990 Memorandum Opinion and Order at 5 and 15-16, *essentially affirmed* in *Crow III; Nelson v. Serwold*, 687 F.2d 278, 281 (9th Cir. 1982) (purpose of restitution is to restore the defrauded party to the position he would have had absent the fraud and to deny the fraudulent party any benefits, whether foreseeable or not, which derive from his wrongful act).

Based on these principles and authorities, the violations of federal law established in *Crow II* should be remedied through the three causes of action described above.

2. <u>Defendants' Position.</u>

(a.) To the extent these questions are directed to resolution of tax amounts paid by Westmoreland to Montana and Big Horn County, the defendants' legal position has been set forth below.

(b.) To the extent the questions suggest that any form of monetary recovery may be available with respect to the Tribe's relationship with Shell Oil Company, the Court's July 23, 1993 order is dispositive.

(c.) To the extent these questions suggest that relief is available under 42 U.S.C. §1983, they must be answered negatively. First, the fourth amended complaint contains no claim under 42 U.S.C. §1983, and the deadline for requesting amendment has passed. Second, the Tribe is not a "citizen of the United States or other person" under section 1983. *Coeur d'Alene Tribe v. Idaho*, 798 F. Supp. 1443, 1452 (D. Idaho 1992); *See also White Mountain Apache Tribe v. Williams*, 810 F.2d 844, 852 n.10 (9th Cir.) ("it is doubtful whether a tribe 'qua sovereign, would qualify as a 'citizen of the United States or other person' entitled to sue under §1983"), *cert. denied*, 479 U.S. 1060 (1987). Third, neither the State nor Director Robinson in his official capacity is a "person" against whom retroactive liability may be imposed under section 1983. *Will v. Michigan Dep't of State Police*, 491 U.S. 58, 64-65, 71 (1989). Fourth, retroactive relief against the State and Defendant Robinson in his official capacity is barred by the Eleventh Amendment. *Quern v. Jordan*, 440 U.S. 322, 340-45 (1979); *Edelman v. Jordan*, 415 U.S. 651, 674-77 (1974). Finally, the fourth amended complaint does not otherwise state a claim upon which relief may be granted

under section 1983. *E.g., Hoopa Valley Tribe v. Nevins*, 881 F.2d 657, 661-63 (9th Cir. 1989), *cert. denied*, 494 U.S. 1055 (1990).

D. What law governs resolution of the Tribe and United States' unjust enrichment claims?

1. *Tribe's and United States' Position*. The causes of action of the Tribe and the United States based on restitution or unjust enrichment are federal claims which may borrow from state law. *Franklin v. Gwinnett County Public School*, ___ U.S. ___, 112 S. Ct. 1028, 1035, 117 L.Ed 2d 208, 216-220 (1992); *Wilson v. Omaha Indian Tribe*, 442 U.S. 653, 673 (1979); *Board of County Comm'ners of Jackson County v. United States*, 308 U.S. 343, 350-351 (1939); *City of New Orleans v. United States*, 371 F.2d 21 (5th Cir. 1967), *cert. denied*, 387 U.S. 949; December 26, 1990 Memorandum Opinion and Order at 9-11, 13, 15-16.

2. *Defendants' Position*. A federal common law right of restitution for unjust enrichment should not be implied under the Omnibus Mineral Leasing Act of 1938, 25 U.S.C. §§396a to 396g, the Supremacy Clause, U.S. Const. art. VI, cl. 2, or principles of tribal self-governance. The authority to create such law is quite limited and extends to "essentially two categories: Those in which a federal rule of decision is 'necessary to protect uniquely federal interests[ ]' . . . and those in which Congress has given courts the power to develop substantive law." *Texas Industries, Inc. v. Radcliffe Materials, Inc.*, 451 U.S. 630, 640 (1981); *Accord Mortgages, Inc. v. United States Dist. Ct.*, 934 F.2d 209, 213-14 (9th Cir. 1991) (per curiam). Neither instance is present here. However, even if a federal common law-based remedy of restitution may be implied, the

rule of decision should be supplied by reference to Montana law. *United States v. California*, 932 F.2d 1346, 1349 (9th Cir. 1991) ("[w]here there is no clear body of applicable federal common law, state law must be applied unless a "significant conflict between some federal policy or interest and the use of state law in the premises' is demonstrated"), *aff'd*, 113 S. Ct. 1784 (1993); *accord First Interstate Bank v. S.B.A.*, 868 F.2d 341, 343 n.3 (9th Cir. 1989); *United States v. California*, 665 F.2d 914, 917 (9th Cir. 1980).

E. What are the substantive elements of a claim for unjust enrichment with reference to the restitution relief sought here?

1. *Tribe's and United States' Position*. The substantive elements of a claim for restitution or unjust enrichment are:

(i) a wrongful act;

(ii) specific property acquired by the wrongdoer traceable to the wrongful act; and

(iii) a reason, in equity and fairness, why the person holding the property should not be allowed to keep it.

December 26, 1990 Memorandum Opinion and Order at 15, citing *Alsco-Harvard Fraud Litigation*, 523 F. Supp. 790, 806-807 (D.D.C. 1981). *See also, Schaeffer v. Miller*, 41 Mont. 417, 423, 109 P. 970, 973 (1910). These elements are the same for both the assumpsit (or quasi-contract) action and an action to impose a constructive trust. The two actions differ in terms of remedy; assumpsit (or quasi-contract) leads to a money judgment whereas the constructive trust remedy is directed to a specific res in the

defendant's possession. December 26, 1990 Memorandum Opinion and Order at 4-5.

Neither the assumpsit nor constructive trust actions requires that the plaintiff have had an entitlement to the property when received by the defendant or that the defendant have an independent legal obligation to turn the funds over to the plaintiff. To prevail, the Tribe and the United States simply must show it would give offense to equity and good conscience to allow Montana and Big Horn County to retain the coal taxes they illegally imposed and collected at the Tribe's expense. *Crow III; Hoopa Valley Tribe v. Nevins,* 881 F.2d 657, 659 (9th Cir. 1989), *cert. denied,* 494 U.S. 1055 (affirming an award to an Indian tribe of state taxes illegally imposed on purchasers of tribal timber plus prejudgment interest); December 26, 1990 Memorandum Opinion and Order at 13-17.

2. *Defendants' Position.* The substantive predicates justifying the creation of a quasi-contractual obligation or a constructive trust for unjust enrichment are the same, and both forms of restitution are viewed as equitable in nature under Montana law. *E.g., Mason v. Madson,* 90 Mont. 489, 498, 4 P.2d 475, 477 (1931); *Eisenburg v. Goldsmith,* 42 Mont. 563, 577, 113 P. 1127, 1131 (1911); *Lewis v. Lindsay,* 19 Mont. 422, 439, 48 P. 765, 772 (1897). These remedies differ because an action based in quasi-contract, or assumpsit, "leads to a simple money judgment" (I George E. Palmer, *The Law of Restitution* §1.3 (1978)), while the constructive trust remedy is directed to a specific res in the defendant's possession. Unjust enrichment is shown "'by any legal evidence . . . that the defendant has received or obtained possession of the money of the plaintiff, which, in equity and good conscience, he ought to pay over to the plaintiff.' " *Schaeffer v. Miller,* 41 Mont. 417, 423, 109 P. 970, 973 (1910). Two necessary elements of such a claim, however, are proof that the plaintiff had an entitlement to the funds when received by the defendant and that the defendant otherwise has an obligation to tender the funds over to the plaintiff. *Schaeffer,* 41 Mont. at 424, 109 P. at 973; *accord McFarland v. Stillwater County,* 109 Mont. 544, 551, 98 P. 321, 323 (1940); *Valley County v. Thomas,* 109 Mont. 345, 381, 97 P.2d 345, 364 (1939). Because the assumpsit and constructive trust remedies are equitable, they are unavailable if an adequate remedy at law exists, or existed, through which the amounts at issue have been recovered. *See, e.g., Meyer v. Lemley,* 86 Mont. 83, 92, 282 P. 268, 271 (1929); *Philbrick v. American Bank & Trust Co.,* 58 Mont. 376, 387, 193 P. 59, 62 (1920); *Dunne v. Yard,* 52 Mont. 24, 31, 155 P.2d 273, 275 (1916). The same principles apply even if non-Montana decisional authority supplies the rule of decision. *E.g., U.S. v. California,* ___ U.S. ___, 113 S.Ct. 1784 (1993); *Niagara Mohawk Power Corp. v. Bankers Trust Co.,* 791 F.2d 242, 244-45 (2d Cir. 1986); *Van-Tex, Inc. v. Pierce,* 703 F.2d 891, 897 (5th Cir. 1983); *S.S. Silverblatt, Inc. v. East Harlem Pilot Block-Building & Housing Dev. Fund Co.,* 608 F.2d 28, 41 (2d Cir. 1979); *Trans-Bay Engineers & Builders, Inc. v. Hills,* 551 F.2d 370, 381-82 (D.C. Cir. 1976); *Knighton v. Texaco Producing, Inc.,* 762 F. Supp. 686, 693 (W.D. La. 1991); *F.D.I.C. v. British-American Corp.,* 755 F. Supp. 1314, 1324 (E.D.N.C. 1991); *East River Savings Bank v. Secretary of Housing & Urban Dev.,* 702 F. Supp. 448, 455 (S.D.N.Y. 1988); *Taylor Woodrow Blitman Constr. Co. v. Southfield Gardens Co.,* 534 F. Supp. 340, 348 (D.

Mass. 1982); *Weiner v. Bank of King of Prussia*, 358 F. Supp. 684, 704 (E.D. Pa. 1973); *D.C. Trautman Co. v. Fargo Excavating Co.*, 380 N.W.2d 644, 645-46 (N.D. 1986); *City of Norfolk v. Norfolk County*, 91 S.E. 820, 825-26 (Va. 1917).

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
BILLINGS DIVISION

THE CROW TRIBE OF INDIANS, Plaintiff,	)	No. CV-78-110-BLG-JDS
and	)	Volume I
UNITED STATES OF AMERICA, Plaintiff-Intervenor,	)	
vs.	)	
STATE OF MONTANA; MICHAEL J. ROBINSON, Director, Montana Department of Revenue; BIG HORN COUNTY, Montana; MARTHA FLETCHER, Treasurer, Big Horn County, Montana, Defendants.	)	

TRANSCRIPT OF PROCEEDINGS

The above-entitled matter came on for trial in open court before the HONORABLE JACK D. SHANSTROM, United States District Judge, on April 18, 1994.

APPEARANCES

For the Plaintiffs:
MR. ROBERT S. PELCYGER
MR. WILLIAM HUGENBERG, JR.,
MR. MICHAEL AUSTIN
Fredericks, Pelcyger, Hester & White
1881 9th Street, Suite 216
Boulder, CO 80302

RICHARD L. MATTSON
Official Court Reporter
United States District Court
316 N. 26th St., Rm. 5405
Billings, MT 59101
(406 259-1705

[p. 54] Q. Referring to the first question, what is your conclusion regarding the question of whether Montana and Big Horn County collects sufficient revenues to cover governmental costs associated with the Westmoreland mine, excluding the severance and gross proceeds tax revenues on Crow Coal?

A From my analysis, I concluded that taxes from other sources than Crow Coal associated with the mine more than adequately cover costs associated with the mining operation, in fact substantially exceeds the costs directly associated with the mining operation.

Q Would you refer, please, to Figure 1.1 of your report and describe what that bar graph shows?

A Yes. Figure 1.1 makes the comparison between taxes earned on the mining activity at Absaloka, other than on Crow Coal, and compares it to estimates of

expenditures by the government, the State and local government, associated with mining operations.

THE COURT: 1.1?

THE WITNESS: 1.1 at page 4, Your Honor.

The column to the far left, labeled taxes earned, demonstrates the amount of money generated through various taxes by the mining operation at Absaloka. I estimated a [p. 55] total of 29.3 million had been collected between 1976 and 1986. These include such things as the severance and gross proceeds taxes on state-owned coal mine by the – at the Absaloka mine; royalties to the State on that coal, as well as property taxes and income taxes paid by both Westmoreland and its mining contractor, Morrison-Knudsen, as well as income taxes generated by those employees of the mine who pay such taxes. You see the shadings indicate the various components of that. The gray is coal related taxes, and royalties, again, this is on coal other than Crow that's mined at this operation.

The cross-hatched area is other mine related taxes, those would be chiefly property taxes on equipment and buildings and so on.

And the final component, in white, are the income taxes generated by both the workers at the mine and secondary workers that I estimated to be associated with the mining operation. So that totals to 29.3 million.

The next two groups of bars are estimates of expenditures that are clearly directly related to mining operations. The one to the far right includes just two components and totals one million dollars. One of those components is the State's estimate of what it costs each

year to regulate mining – to regulate the Westmoreland Absaloka mine, that is to have mine inspectors come by and [p. 56] inspect the operations to do what necessary work there is during the course of a year to keep the mine operating according to state and federal standards.

The other component of that is chiefly capital expenditures which have been amortized to cover the expenses related to a road that was financed by the State that was deemed necessary for the mining operation.

The middle bar, then, adds some additional potential expenditures to that, which may be directly related to the mine, though not as clearly so as the first two. The other mine-related taxes totaled $3.9 million, bringing the total of that middle bar to $4.9. That $3.9 million includes – is based on an estimate of how much on a per capita basis any additional workers that the mine has generated, I should say any additional people, that have come to Big Horn County as a result of the mining operation, have generated in terms of demands for government services.

So we come up with a per capita cost to providing services based on the budgets of the local governments, we assume that a certain number of people have come to the county because of the mine, and the additional costs and burdens of those people, then, are costed out and included here to establish the additional $3.9 million.

Now, many of the workers in the case of the Absaloka mine were already located on or near the [p. 57] reservation, many of them are in fact members of the Crow Tribe. So unlike other places, we saw relatively minor migration into the area as the mining operation began and continued.

So as you can see looking across these various estimates, the estimate of taxes earned at the Westmoreland mine by the state and local governments, other than those related to Crow Coal specifically, are $29.3 million compared to somewhere between $1 million and $4.9 million dollars. So there's quite an excess of taxes, revenues generated against costs directly related to mining activity.

Q Now, did you look for any evidence of what is called a boom and bust syndrome with regard to the Westmoreland mine?

A Yes, I did.

Q What did you find in that regard? First, describe more eloquently than I did what boom and bust means to you?

A Yes. One major concern by state and local governments, particularly in the early '70's, and particularly by western state and local governments, was the boom and bust cycle that had been observed in the past in the west, when economic development occurred very rapidly, bringing in lots and lots of new citizens demanding additional services beyond what existing infrastructure [p. 58] could provide, but then after a fairly short period of time, that economic development would cease, the mine would be tapped out, whatever other operations were associated would be gone, and the local and state governments would be left with the tab. They would still had [sic] these very large expenditures and infrastructure that they had built, but no people to provide services to, and more importantly, a limited tax base to cover the remaining costs associated with them.

In fact, that's what, in many instances, precipitated the interest on the part of state governments to impose greater taxes on energy production, coal in particular, was to help both limit the rapid growth and to finance the demands for services that would be associated with that growth.

There are lots of examples across the west of where that kind of rapid growth took place. A good example is Sheridan, Wyoming, in which population increased dramatically as a result of mining, but in fact wasn't incorporated to include any of the specific mines. So while they saw great population growth, it saw no tremendous increase in the tax base, and as a consequence, found itself in difficult times unable to meet its expenses.

In the case of Absaloka mine, we saw nothing like that. We saw no great influx of population into Big Horn [p. 59] County or to the reservation. We saw not particularly rapid growth in population associated with the mining operation. We saw no, – as a result no substantial demand, increase in demand, for services, that is, not new schools and hospitals were not required because of population associated with the mine. Apart from the one road I mentioned before, there was little to do in the way of the standard kinds of infrastructure you may think of, like roads and highways and bridges and so on, public buildings.

And so as a consequence while the boom cycle and bust cycle are sometimes a reality in the west and subject to real concern, in the case of the Absaloka mine, none of that kind of problem arose and put any kind of burden on the State or local government.

Q I'd like to refer you to Tables 2.1 and 2.2 on pages 17 and 18 of the report. Would you describe what is shown on those tables relative to the testimony you just gave?

A Yes. At page 17, Table 2.1, I have compared coal production over time, over the period 1972 to 1992 in Montana and Wyoming, and then for selected counties, which either were the location of most of the mining activity, or a lot of increased population related to mining activity.

As you can see, in Big Horn County, as you probably already know quite well, production increased [p. 60] dramatically from 800,000 tons in 1972 to over 22 million tons in 1992. The production growth over the period '73 to '92 was over 400 percent in Big Horn County.

There were other counties, however, who saw even more dramatic growth than that. In Wyoming, for example, Campbell County saw growth production from 1,623,000 tons in 1972 to over 159,000,000 tons by 1992. So there has been quite dramatic growth in lots of counties.

In contrast, in Wyoming, Sheridan County, has actually seen a slight increase since 1972, but then a dramatic reduction. So that today, whereas in 1992, rather, production is only 71,000 tons compared to 463,000 tons in 1972.

The next table that you referred to, Table 2.2 at page 18, looks at population growth in those same jurisdictions, both the State and the counties regarding – involved in coal production. And several interesting things should be noted from this table.

First, as you can see looking at the Big Horn County row, Big Horn County's population grew by 10 percent between the '70 and '80 census. And then by only 2.2 percent in the '80 and '90 census. Keep in mind, as I point out in the previous table, coal production increased dramatically from under a million tons per year to over 22 million tons a year over that period.

[p. 61] So despite the dramatic growth in coal production, we are not seeing what I would term at least dramatic growth in population over either the '70-'80 period and certainly not the '80 to '90 period.

In contrast, if you look at some of the other coal counties, you will see much more dramatic growth in population. In Rosebud County, Montana, population increased by 64 percent between '70 and '80. And Campbell County, Wyoming, which showed that tremendous increase in production, we see population going growing by 88 percent. And in Sheridan, Wyoming, although coal production didn't increase, we saw a 40 percent increase in population and that has to do with the fact that miners working at the mines in the surrounding areas, oftentimes prefer to live in Sheridan, Wyoming.

In fact, even a fair number of mine workers at the Absaloka mine, the Westmoreland mine, and the ceded area, live in Sheridan, as so do workers at the NERCO Spring Creek mine and I believe at the Peabody mine, or Decker mine, rather, as well.

The other important point I think to raise here, going back to Big Horn County, is you will see in the middle of the page a breakdown by race, between white and non-white. We couldn't break it down any further with this

particular census data, but non-white in this instance is [p. 62] primarily native American, and among native Americans, principally Crow, although the Northern Cheyenne, of course, as well and others.

But here you can see that although the overall Big Horn County population, as I pointed out, increased by 10 percent, 10.3 percent, between '70 and '80, what really was going on was that the Native American population, or the non-white population here, was growing very rapidly at 31.6 percent. But that the white population in Big Horn County actually fell by almost 4 percent over that period.

So that the growth we are observing in Big Horn County in that period, '70, '80, is clearly not mine related but more related to the fact that the Indian population in general, and the Crow population in particular, were growing at a fairly rapid rate having nothing to do with mining operations. So there clearly has been no population growth in the Big Horn County that can be attributed to the Absaloka mining operation.

Q Now, in this connection, did you also look what happened to the mill rate levies in Big Horn County during this period?

A Yes. We took a look at the mill rates over the same period of time as a means of gauging whether or not the county was in fact suffering any difficulties in meeting its obligations, in meeting the costs of providing services to [p. 63] its citizens. If, in fact, there was a tremendous increase in demand for those services, without an adequate increase in the tax base, one would

expect to see the mill rates increasing in order to cover those costs.

What we see instead is over most of the period, relatively flat or even falling mill rates, which suggests the opposite was the case. As demand for services were not increasing rapidly, but at the same time the tax base was, such that there doesn't appear to be a substantial financial burden placed on Big Horn County in particular.

As you can see at page 11 of the report, in 1973 the overall mill levy in Big Horn County was 107.86, and that by 1987 the mill levy had decreased to 91. During the same period, the Consumer Price Index, which is a useful indicator of inflation, rose at 156 percent, suggesting that while costs were on the rise overall, unrelated to growth, the State – the county, rather, was able to lower its tax rate.

I should also point out that although this is not presented here, it was presented in my previous report in 1983, that among counties of similar size to Big Horn County, and size being measured here in terms of either population or land area, that Big Horn County's mill rates were among the lowest. That also suggests to me they were not financially strapped as a result of rapid growth related [p. 64] to mining operations. I think that's further evidence of that conclusion.

Q Would you refer, please, to Table 2.4, and describe what's shown on that, as well as 2.5?

A Yes. Table 2.4 at page 20 is the detailed breakdown of that $29 million dollar figure that I reviewed in the first Figure, which identifies how much tax and royalty revenue was generated by the Westmoreland mine, other than on Crow Coal. As you can see, the final number at the far right column at the bottom is that $29 million dollars that I mentioned.

You can see in this table what the – more clearly what the piece parts are to that number. If you go over to the far left-hand side, you will see the breakdown, and let me go through it with you quickly.

Under the coal-related components of these revenues, we included the severance tax, here, again, on state coal only. That is, only coal being mined on state lands at the Absaloka mine. We included gross proceeds taxes, but, again, limited to those related to the state lands under the mining operations.

And we included royalties being generated by the coal production on state lands for the state.

We also included the revenues from the resource indemnity trust tax, which applies to all coal. The Tribe [p. 65] has not attempted to claim that tax, and that tax continues to be collected and was collected on all coal, including theirs, and will continue to be.

And then finally, we included the Service Mining Control Reclamation Act fees that the federal government imposes, but then shares with the local governments, state governments. Here, again, we limited those revenues only to those generated by the state coal, not the Crow Coal.

The total for those coal related revenues, total $20.7, almost $20.8 million dollars. So that's clearly the largest component of the total taxes earned unrelated to Crow Coal from the mining operation.

The next component are what we refer to as mine-related revenues. There are three components there.

The first is the income taxes paid by Westmoreland to the State. Those total to be a little bit over – almost $1.5 million, just under $1.5 million over this period, '76 to '86. We also included Westmoreland's non-coal property taxes paid to the – paid to the State, or actually initially, at least, to the county government. Those, again, are for things like machines and equipment and shelter and other structures.

The final component of that is the Morrison-Knudsen property taxes. Morrison-Knudsen is the – or was the operator for Westmoreland at the mine, and they [p. 66] also paid for their property into the property taxes collected by the county. Those are included here as well. The second component, other than mine-related, totals to about $5.2 million dollars. $5,171,637.

Q What about income taxes paid by Morrison-Knudsen?

A We were unable to identify those. We believe that some were in fact paid, but since I couldn't establish how much, we did not include those in these calculations. To that extent it understates the revenues generated.

The final component is mine workers, and these are broken into 2 components. The first is miners' income taxes, and then the second is secondary income taxes.

The first refers to the income taxes paid by mine workers, who work at the mine, to the State. We excluded from the number of miners who pay those taxes members of the Tribe who live and work on the reservation who do not pay those, but those who live off the reservation are included.

The final component is what we refer to again as the secondary income taxes. Those are income taxes paid by workers or people who we have identified being related to the mining operation. That is that they are there, they are earning their incomes, as a result of the mine being operated there. We used what economists and planners refer to as a multiplier to establish how many secondary or indirect workers are associated with direct workers at a [p. 67] particular – in a particular industry, so while there may be – for every one mine worker there may be another half of a worker or another two workers doing other things related to the mining operation; servicing it, for example, outside contractors, or providers of goods and services, restaurant operators, a whole range of providers within the economy.

So we took an estimate of how many of those people and what their average income might be and what in turn they would generate in terms of income taxes to the State. That amounted to the $1.4 million you see under the total column.

So those three broader components totaled to the $29.3 million we show here.

Q Then would you explain the table on the next page, Table 2.5?

A Yes. 2.5, in fact, is the explanation of those last two components of the number of coal miners and the number of secondary workers that we estimated were related to the mining operation, and then how much each of those workers and secondary workers generated in terms of income tax.

Column 2 is the average miner's salary, the average salary that each miner was earning. We based that on a state-wide average of coal worker income. We adjusted it in each of these years for inflation, that's what the CPI [p. 68] index and the column numbered 1 is there for.

The number of coal miners associated with the mine are presented in Column 3, and there were 122 in 1976. It grew to as many as 193 by 1979, and then has been falling since to, to a total – over the period fell at least down to 104 by 1986.

We then estimated the income generated by these miners simply by multiplying the average miner's salary times the number of workers. So that as you see in Column 4, we estimate that in 1976 $2,100,139 were generated in income by those miners, and that's the product of the $17,214 per worker times the 122 coal miners.

Then Column 5 is the estimated income tax on that income. And there we looked to both the average tax rate that was indicated in a Montana Coal Council report on coal miners, and by reference to the All State's Tax Handbook, which indicates average tax rates, by state, for various groups of taxpayers. As you can see, using the 1976 example, that resulted in about $100,419 in income taxes to the State in 1976.

Then Column 6 is the number of secondary workers. As I explained before, the number of workers that were generated in addition to those working directly at the mine.

Again, using multipliers, here we took a multiplier of 1.7151, which is noted at footnote 5 to this [p. 69] table, and that's based on a state level input-output model that the Department of Commerce, at the federal level, puts together on a fairly frequent basis.

So using that multiplier and multiplying that times the number of coal miners, we estimated there were 209 secondary, or indirect, workers. For example, 122 times 1.7151 would generate 209 workers. We then took average workers salary for those workers based on the average Montana salaries, as reported in the U.S. Census in '90, and then, using that same inflator, adjusted that value to each of these years, so that in 1976, the average salary, according to that number, would be $7,603, and by 1986, that salary would have reached $14,644. You can see coal miners are paid reasonably well relative to the average in the state over this period.

Then to estimate the income tax generated by the secondary workers, we first calculate the total income, which is the number of secondary workers times their average income, and that yields Column 8. So that 209 times $7,603 would give us the $1,590,799. Then applying the same tax rates we applied in Column 4, or Column 5, rather, we would then generate the income tax paid in 1976, that would total $76,064.

Following that process through each year, '76 to '86, we then estimated that there would be a total of [p. 70]

$3,328,142 in income taxes. And that breaks out, as you can see right above that, to $1,434,424 by secondary workers, and $1,893,719 by the mine workers themselves.

Q Was that information then utilized in Table 2.4?

A Yes, that was, as I indicated a minute ago, those numbers would match. The numbers you see in Table 2.4 in the total column for miners' income taxes, and secondary income taxes, the $1,893,719 at the bottom of Column 5 in Table 2.5 is the same number you will see in the total column of Table 2.4 for miners' income taxes.

Q In the course of your analysis of this issue, did you also consider environmental risks and potential liabilities associated with the Westmoreland mine?

A Yes.

Q And what were your conclusions?

A I concluded that there were no substantial additional quantifiable risks to this mining operation that weren't already accounted for in a number of other ways.

First of all, as I showed in Table 2.4, one of the taxes collected by the State on all coal, including Crow, is the resource indemnity tax. That tax was designed to provide the State with funds to deal with environmental problems that might arise at a mine, or after a mine is closed. So there is one source of money already being collected to cover the risks associated with mining [p. 71] operations.

In addition, both the state and the federal government require the mine operators post substantial bonds before operating their mines. In order to cover the potential environmental costs that might arise. So there's there

is a second form of insurance to cover the costs that might arise from the risks of the mining operations.

And, finally, the Absaloka mine, as Mr. Presley probably knows too well, is regulated at several different levels of government. Not only are they visited by state inspectors, they are visited by federal inspectors and visited by Crow inspectors. So that they get their share of regulatory review and inspections. As a result, have had no serious violations reported in their operations.

And I should also note that Montana does a very impressive job of monitoring its mining operations. It has among the lowest levels of citation rates in the country, particularly among western states. So it doesn't appear to me that there is any substantial risks left uncovered associated with the mining operation.

Q You mentioned the regulation of the Westmoreland mine, and I just wanted to go back for a minute to the bar graph, which is i guess reproduced twice in your report, Figure 1.2 and also 2.1.

Would you describe, again, the cost that you [p. 72] identified as mine regulation costs that are shown in the middle column and the right-hand column on that bar graph?

A Yes. Again, the bar graph includes two components totaling to approximately a million dollars. One is associated with the construction of infrastructure of roads to the mine that the State incurred. And the second component, which is roughly equal in size, are costs associated with regulating the mine that the State has

identified, that they identified previously, I believe, in the 1993 proceeding.

Q So does that assume that the costs incurred by the State for mine regulation come from state funds?

A Yes. I have not made any adjustments for the likelihood that some state regulatory costs are subsidized by the federal government. The SMCRA tax is often used to help finance state regulation of mining operations. But I did not make any adjustments for that.

Q So this assumes full costs borne by state funds?

A That's correct.

Q Finally, with regard to this issue, would you direct your attention, please, to Table 2.3 on page 19, and describe that for us?

A Yes, Table 2.3 at page 19 compares the amount of money that Big Horn County contributed to the Montana School Equalization Program between 1977 and 1987.

[p. 73] The column number 1 is the Big Horn County collections for school equalization, this is the elementary school and high school taxes imposed by the direction of the State, which are collected, and then reallocated or redistributed to counties and school districts, depending on whether or not they are deficient in having funds necessary to meet certain spending requirements based on class size or number of students enrolled in various school districts.

And what this table shows is, in fact, owing to the large tax base in Big Horn County, that the tax base is largely driven by the value of coal produced within the

county, that in most years the Big Horn County has actually sent money back to the State; that is, they have collected more than the State requires them to cover the costs of education, and as a result these monies go back to the State for reallocation to districts who aren't able to collect sufficient funds using the State level – the State set level of tax rates, of mill rates.

As you can see, in some years more than 50 percent of the monies collected went back to the State. I think over the entire period, and these number should have been included in the table, that over this period, '77 though '87, the total amount that was recaptured by the State, according to these numbers, was 33.6 percent. That's based on a total of roughly $51.4 million in collections, [p. 74] that's the sum of Column 1, compared to the amount sent to the State, or recaptured by the State, which totals to around $17.3 million dollars.

I should note, in looking at the State's expert's report on this subject, they came out with slightly different numbers. I have gone back and looked at our sources, my numbers match those sources, but the State's experts' reports numbers match their sources. So I couldn't reconcile at this point why the difference, but despite the differences in some of the dollar amounts, we are not talking about a substantial differences [sic] in the share of funds collected that went back to the State.

Again, using the numbers we relied on, we found that 33.6 percent went back to the State. Using the State's reports, it appeared that roughly 26 percent went back to the State.

I can't explain that yet, but the point is made in either case a substantial amount of the money does not stay within the county but in fact goes back to the State.

Q What do those numbers indicate with regard to the relative financial well-being of Big Horn County versus other counties in the state?

A Well, again, it indicates that because of this tax base, that Big Horn County is not financially strapped, it is actually able to generate more than it needs, at least [p. 75] at one level of education spending. As a consequence, ends up contributing to other districts.

In most years there were no more than I think three or four, maybe at most half dozen counties, that were in financial conditions good enough that they actually generated funds sufficient to send monies back to the State. So it's another indicator that the State has been financially – the county, rather, has been financially healthy over this period.

Q Have you determined two things, the amount of money that Westmoreland's taxes contributed to the State School Equalization Program, and of that total amount, how much was recaptured by the State?

A Yes. I believe those numbers are as follows: The total amount of gross proceeds taxes generated for these school purposes at the Westmoreland mine was roughly just above $5 million dollars, I believe. If in fact – that is the total amount was roughly $5 million dollars. Of that amount roughly $4 million, or $3.9 million, went to equalization.

Q You mean was recaptured by the State for equalization?

A Let me – I always confuse these numbers. I apologize. I'm sorry, roughly $5 million was in fact collected for school purposes. Of that $5 million, $3.9 [p. 76] million goes, I believe, into – recaptured by the State for other purposes.

Q For other areas?

A For other areas, right. That the State takes and spends in counties other that Big Horn.

Q Now, were the conclusions that you reached that you have testified here to this morning, and are as reflected in Chapter II of Exhibit 319, are those consistent with your previous report and testimony that was done for the 1984 trial?

A Yes.

* * *

[p. 86] Q Now, did you also, for purposes of comparison, make determinations or comparisons between the Westmoreland tax payments and payments received by Montana from other coal producers?

A Yes. Let me make sure I understand your question. Are you saying do we compare how much was collected in severance and/or gross proceeds from the Westmoreland mine compared to all other mines? Yes.

Q Yes. And would you show us where your report did this and describe those figures to us?

A Yes. I believe those are presented back up in the front of the report in several of the very early tables.

Yes, if you would refer to Table 1.2 at page 7. This table presents the 1994 value of the Constitutional Trust Fund that Montana established using the total payments made to the trust fund over time from all coal mines, and then applying the time-weighted returns reported by the Montana Board of Investments. So that, as you can see in Column 2, the total amount of money invested in the [p. 87] Constitutional Trust Fund between 1976 and 1993, totaled $497,589,524, and that, again, the Westmoreland payments that compared that, are $46,811,029.

If you look over to the far right, you will see that the total benefits to the State that is applying both the investments and the returns on those investments, the total returns, the total amount, as of the end of 1993, was $1,033,156,423.

If you apply the same returns to the Westmoreland payments, they comprise $262,701,210 of that total. So they represent roughly 25 percent of that total, if you can divide – if you compare the $262.7 million to the 1 billion, 33 million, that represents – Westmoreland's payments represents with interest, or with return, represent just over 25 percent.

Q And then what's portrayed on Table 1.3?

A Table 1.3 looks at all the severance taxes paid, regardless whether or not those taxes went into the permanent trust fund or went to other purposes, that is, went to other funds, went to meet the coal impact funds, went to meet other demands of the State.

So the numbers that show up in Column 2 of this table are, in fact, the total severance taxes paid to the State in each of those years from 1976 through 1993, and, again, you will see that the totals – the total over this [p. 88] period in severance taxes paid is over a billion dollars. It is $1,127,306,983.

Accounting for the investment return on that money over time through 1993, the cumulative balance is over 3 billion dollars. Almost 4 in fact. The total as you can see to the far right in Column 6, $3,816,587,866. Again, the Westmoreland payments and interest amount to only – only, it is hard to say that here, but $262,701,210. That represents as a share of that total value to the State of over 3 billion dollars of just under 7 percent. So, again, comparing the $262.7 million to the $3,816 million dollars in total benefits to the State, the Westmoreland component represents just under 7 percent.

THE COURT: We will adjourn for the noon hour here.

(Recess.)

* * *

[p. 120] Q (by Mr. Pelcyger:) Speaking in general terms, Dr. Berkman, just now dealing with the Montana tax, not the double tax, but the size of Montana's tax in your opinion adversely affect the development of Crow Coal?

A Yes.

[p. 121] MR. SMITH: I was going to object before the witness' response.

MR. PELCYGER: All these matters were covered in the original report about the marketability of report. I could go through a series of questions about that.

THE COURT: I will overrule the objection.

MR. PELCYGER: Would you read the question?

(Question read.)

A Yes, I do.

Q (By Mr. Pelcyger:) Would you amplify that, please?

A Yes. The Montana's severance tax was, I should say, during that period, quite high. It was a 30 percent rate combined with the gross proceeds tax, which made it among the highest anywhere, and certainly substantially higher that the primary competition for Montana coal, which is Wyoming. Both states cover the Powder River Basin, so they were in direct competition with each other for production.

The fact that mining investors had a choice between Montana and Wyoming and saw much higher tax facing them in Montana, clearly had an effect on where they decided to locate their mines and produce their coal.

Q Now, in your opinion would the Tribe have been in a better position to market its coal if it was able to [p. 122] control the tax rate on that coal?

A Yes, very definitely. Again, the tax has an important effect on the ability of the owners to sell their coal. It affects the price of the coal and, therefore, the demand for

the coal. Had the Tribe been able to secure a lower tax, had it wanted to promote additional production, it could have, giving it much greater flexibility in regulating and developing their coal resources.

The State of Montana has recognized this over time by its fairly recent decision to reduce the coal tax rate in Montana.

Q Now, of course, the Ninth Circuit and Supreme Court ruled in 1987 and 1988 that Montana tax was invalid. Would you describe how the market had changed within that period?

A Yes. There was a fairly dramatic change in coal markets, particularly Powder River Basin coal markets, between the mid-'70's, when the severance tax was first imposed and when the Crow initially attempted to impose their own, and the late '80's when the Tribe was finally able to impose its own tax independent of the state.

During the early and mid-'70's we were experiencing a tremendous boom in demand for Powder River Basin coal. Several things – several conditions, though, were responsible for that taking place. For example, the [p. 123] Clean Air Act Amendment of 1972 put a real premium on low sulfur coals. The Powder River Basin a major source of low sulfur coal. There was an immediate interest in further production of Powder River Basin coals in Montana and Wyoming for that reason.

In addition, OPEC imposed its embargo in the early '70's, and that was followed a few years later by the Iranian embargo, and as a result, oil prices and natural

gas prices went up dramatically, making coal a far more attractive fuel for utilities in particular during that period, which prompted further interest in demand for coal in general, and Powder River Basin coal in particular, because it is actually very low cost to extract, in addition to its low sulfur properties.

We also saw continued increased demand for electricity particularly in the more rapidly growing western states, and the federal government, also, imposed additional regulations in the late '70's, mid to late '70's restricting utilities from further use of natural gas, which put a further benefit to coal in general, and PRB coal in particular.

So we saw a great interest in investing in western coal and Powder River coal, and a great number of new mines opened up in that stretch in between the mid '70's and early '80's. But by the late '80 things had changed a [p. 124] bit. The oil prices, of course, fell; natural gas prices were much higher than people anticipated, leading to lower natural gas prices, and to a removal of the restrictions of federal government had imposed on utilities to use natural gas.

So there was much greater competition across fuels making coal less attractive. By the late '70's the eastern coal interest had prevailed on Congress to amend the Clean Air Act amendment, that was done actually in 1977, which served to protect eastern coal by limiting the premium for low sulfur western coals by forcing utilities to add scrubbers to plants to clean emissions before they entered the atmosphere.

Once you force the utilities to use scrubbers, their interest in using low sulfur coal is much limited because there is no points, they don't save anything by going to low sulfur coals if they have to clean up the air anyway. They would have used low sulfur coals to avoid having to build expensive scrubbing equipment. So things began to change. A lot of the premiums slowly began to be erode [sic] by the late '80's, when the Crow finally had the opportunity to be in complete control of their coal resources through taxation, the market was a much tougher one to operate in.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
BILLINGS DIVISION

THE CROW TRIBE OF INDIANS, Plaintiff,	)	No. CV-78-110-BLG-JDS
and	)	
UNITED STATES OF AMERICA, Plaintiff-Intervenor,	)	Volume II
vs.	)	
STATE OF MONTANA; MICHAEL J. ROBINSON, Director, Montana Department of Revenue; BIG HORN COUNTY, Montana; MARTHA FLETCHER, Treasurer, Big Horn County, Montana, Defendants.	)	

TRANSCRIPT OF PROCEEDINGS

Trial in the above-entitled matter resumed for trial in open court before the HONORABLE JACK D. SHANSTROM, United States District Judge, on April 19, 1994.

* * *

[p. 186] MR. ROSS: You may answer.

THE WITNESS [C. Joseph Presley]: In 1970 the Bureau of Indian Affairs advertised a number of coal tracts out in the ceded strip, advertised those for competitive bids. Westmoreland Resources was the successful bidder on three of those tracts, Tracts 1, 2, and 3.

Q And (By Mr. Ross:) Did Westmoreland subsequently enter into an agreement with Westmoreland on Tracts 2 and 3?

A With the Tribe?

Q Yes.

A Yes. Two years later, June of '72, we converted two of the prospecting permits to coal leases. The prospecting permits gave us the right to convert them to coal leases.

MR. ROSS: Your Honor, may I approach the bench to present the witness with an exhibit?

THE COURT: Yes.

Q (By Mr. Ross:) I'll ask you to refer to Defendants' Exhibit 532 and ask you to identify that [p. 187] exhibit.

A This exhibit is the 1972 coal lease for Tract 3 and Tract 2. They are dated June 6, 1972.

Q And were those 1972 leases approved by the Department of Interior?

A Yes, or an agent of the Secretary.

Q When those leases were negotiated and agreed upon in 1972, Montana's 30 percent coal tax didn't exist; is that right?

A That's correct.

Q What were the monetary terms or economic benefits that Westmoreland agreed to provide the Tribe under those 1972 leases?

A Well, when we got – when we were the successful bidder on the prospecting permits in 1970, I believe we paid $350,000 for Tract 3, and around $150,000 for Tract 2.

Then the 1972 leases provide that we pay the Tribe annual lease rental of a dollar an acre, and that we pay the Tribe 17 and a half cents a ton for every ton of coal that was mined.

Q Did those 1972 leases include any provision for paying the Tribe any sort of tax?

A No.

Q After you entered into the 1972 leases with the Tribe, what did Westmoreland proceed to do?

[p. 188] A Almost simultaneously with signing the coal leases we entered into 20-year long term contracts with four utilities for 4 million tons per year. That was on June 15, '72, I believe.

Then we proceeded to construct a 38-mile rail spur from our mine to Hysham, Montana. We commenced the construction of the plant facilities, the coal handling facilities, and we began erecting a 75 cubic yard drag line.

Q Did the contracts that you entered into with the utilities provide that you could pass on taxes which you thought were valid to the utility customer?

A Our contract provided that we could pass on any new laws or changes or different interpretations of existing laws.

It would only be if there was any valid existing tax ordinance could we pass it on to the Tribe, or to the customer, excuse me.

Q You mentioned that you proceeded to build a railroad and develop the mine. Were there a number of permits and approvals that Westmoreland needed to obtain, in order to develop its mine?

A Yes.

Q I'd ask you to refer, if you would, to Defendants' Exhibit 353.

A Okay.

[p. 189] Q Could you identify Exhibit 353, please?

A This is part of a response, or answers, to a set of interrogatories from someone, I'm not sure which, but it lists the various permits that Westmoreland Resources had to get in order to either develop or operate the coal mine.

Q And were most of those permits obtained from the State of Montana?

A Yes, all but two. One was from the City of Billings, and one was from the Department of Interior.

Q After Westmoreland entered into the utility contracts and received its permits to develop its mine, what happened then?

A Well, we proceeded to construct the facilities necessary to develop the mine.

Q Was there any attempt by the Tribe to stop your mining development?

A There was an effort made by the Tribe to increase their economic benefits from our coal mining, starting in

late 1973. The energy crisis had just hit, oil prices had gone up, and the Tribe felt the 17 and a half cents a ton that they were receiving under the lease, was not enough economic benefit.

So they created a committee, a mineral committee. The committee negotiated, approached Westmoreland Resources and said that they wanted more economic benefits.

[p. 190] Westmoreland Resources met with them in early 1974 and reached a consensus with the mineral committee. We even had a memorandum of understanding on what the new economic benefits would be.

The secretary of the mineral committee signed that, understanding that, subsequently all members of the mineral committee backed down, and would not – no longer supported the memorandum of understanding.

Q So that memorandum with the mineral committee never was fully agreed upon?

A No.

Q Did the Tribe attempt to void Westmoreland's lease?

A About 14 days after we shipped our first train of coal, the Crow Tribe petitioned the Secretary of Interior to void our lease.

Q And what was Westmoreland's response after that attempt to void the lease?

A We continued negotiations with the Tribe, and eventually, on of [sic] November 26th, I believe it is, 1974,

signed amended leases for those – Tract 2 and Tract 3. Those new leases included a lot more economic benefits for the Tribe.

Q Was money the principal subject of those 1974 negotiations and agreements?

[p. 191] A Yes.

Q Would you please refer to Defendants' Exhibit 534 and identify that document?

A That's a settlement agreement that was signed at the same time the amended coal leases were signed.

Q And would you please refer to Defendants' Exhibit 533?

A Exhibit 533 is the amended coal mining lease for Tract 3, the tract that we were developing.

Q And what is the date on that amendment?

A Amended lease, it's dated November 26, 1974.

Q And in what ways did that 1974 amended lease change the terms of the 1972 lease?

A Well, first, we paid the Tribe $1,128,000 and a bonus and advanced royalties.

THE COURT: Paid a million what?

THE WITNESS: $1,128,000. This was a $500,000 of the payment was a bonus, $628,000 was advanced royalties that could be recouped – offset from production royalties, I believe, starting in 1985, something like that.

In addition to that, we agreed to pay the Tribe 6 percent, or .35 cents a ton, whichever is greater, on the

original 77 million tons that we had sold to the original customers, the customer for 20 years.

On any new sales we agreed to pay the Tribe 8 [p. 192] percent of the F.O.B. mine price, or .40 cents per ton, whichever was greater. And that 8 percent royalty component would be subject to royalty renegotiation each ten years, and it has been renegotiated since that time.

In addition to that, we agreed to be at 10 million tons by 1982 on Tract 3. We had ordered another drag line and anticipated having enough business to meet that 10 million ton commitment.

If we didn't meet the 10 million ton commitment, the lease provides that we would pay them the prevailing royalty on half of any shortfall from the 10 million tons.

Q (By Mr. Ross:) And what was Westmoreland's view of the royalty payments and other economic benefits that it paid to the Tribe under that 1974 lease amendment?

A We viewed it as all of the economic benefits that we could afford to pay. We and our utility customers.

Q And how did it compare with compensation of royalties under other existing contracts?

A At that time I think it was by far the highest royalty that was being paid in the nation. Federal royalties at that time were 17 and a half cents a ton, maybe 20 cents a ton.

Q Did the 1974 agreement between the Tribe and Westmoreland include any provision for Westmoreland to pay the Tribe any sort of tax?

[p. 193] A No.

Q Did Westmoreland believe that the Tribe might try to impose a tax on Westmoreland after that 1974 agreement?

A Well, I would say after the amended lease was executed, maybe a year later, or after the State passed their severance tax, we had some concern about double taxation.

Q But at the time the '74 agreement was negotiated, did you think the Tribe may try to also impose any sort of tax?

A No.

MR. PELCYGER: ı object to that. It hasn't been established that Mr. Presley was in any kind of a position then to respond or to make – take policy positions on behalf of Westmoreland.

THE COURT: You can lay a foundation on that.

Q (By Mr. Ross:) Mr. Presley, are you aware of the terms of the 1974 negotiations?

A Yes.

Q And are you familiar with Westmoreland's position and understanding during those negotiations?

A Yes.

Q And, again, it's your understanding, as part of those negotiations that the Tribe would not try to impose a tax on Westmoreland right after those '74 agreements were [p. 194] negotiated?

A It's my understanding that in early '74, the possibility of maybe some kind of sharing of any tax reduction that might occur, might accrue to the benefit of the Tribe. But the Tribe rejected that, and opted for the economic benefits we settled on.

Q And in 1974, was your understanding that the benefits paid under the '74 agreement were the final economic benefits you would pay to the Tribe?

A Yes.

Q From 1974 to 1975, are you aware that Montana passed a new coal severance and gross proceeds tax in 1975?

A Yes.

Q And after Montana passed its coal taxes in 1975, did Westmoreland pay those taxes directly to the State of Montana?

A Yes.

Q And how frequently did you pay those taxes?

A Well, there were two taxes, the severance tax, the 30 percent severance tax, and the gross proceeds tax.

The severance tax was paid quarterly, 30 days after the end of each calendar quarter. And the gross proceeds tax was paid – it's basically a property tax, and half of it I think is paid on November 30th, and the other half is paid on May 30th of the following year.

[p. 195] Q And for how long, or over what period of time did Westmoreland pay the severance tax directly to the State of Montana?

A We paid the severance tax to the State through the third quarter of 1982, and the gross proceeds tax we paid through the first half of 1986 would be my guess.

Q And after that time how did you pay the taxes?

A We paid them to the federal court here in Billings. The severance tax, not the gross proceeds.

Q And why did you pay the severance tax into court?

A Well, in early 1972, I believe it was Bob Pelcyger or Tom Fredericks –

Q Did you say 1972?

A Excuse me, 1982, Bob Pelcyger, Tom Fredericks, approached George Miller, who is an attorney for us with Decker, Price, and Rhodes, about the possibility of joining the Tribe in petitioning the court to have the money paid into the federal court. I believe the Tribe's attorneys felt this might put pressure on the State to settle.

At that same time, I believe Tom Fredericks sent a draft of an amended tax code that he was proposing to submit, which would protect Westmoreland Resources from the thing we were concerned about, and that was double taxation.

George Miller, our attorney, asked me what I thought about it, and I told him I thought that we would be [p. 196] better off to get an amendment to the lease because a tax code could be changed at any quarterly council meeting in the future.

So, as a result of negotiations between George Miller and Bob Pelcyger and Tom Fredericks, I believe we reached an agreement on an '82 lease amendment.

Q Did you pay the severance tax into court pursuant to that '82 agreement?

A Following the execution of that agreement, we, I believe, Westmoreland and the Tribe, petitioned the court to have the money paid into court. And I believe in January of 1983, Judge Battin issued such an order.

Q So you paid the severance tax into court starting sometime in January, '83?

A Well, the fourth quarter payment for '82 would have been due on June 30th, and I think Judge Battin's order came out before that. So we paid the fourth quarter of '82 into the federal court.

Q And that was done pursuant to the '82 agreement and the Court's order?

A Right.

Q I want to come back and talk a little bit more about the '82 agreement, but let's go back to 1976.

You've testified that starting in 1975 you paid the Montana tax directly to Montana. Are you aware that the [p. 197] Tribe passed a tax ordinance in 1976?

A Yes.

Q And did Westmoreland have any input or involvement in that process whereby the Tribe adopted that '76 tribal ordinance?

A No.

Q Would you refer, please, to Exhibit D-527.

A D – mine says 527. I guess that's D-527?

Q Yes. And would you identify that, please?

A This is an ordinance which the Tribe adopted a tribal coal taxation code.

Q And what was your understanding regarding the amount of that tax under the tribal ordinance?

A This exhibit doesn't have a rate, but it was my understanding that the rate was 25 percent of the F.O.B. mine price.

Q And what was your understanding regarding the intended scope of that tax ordinance?

A It was my understanding, and it was our concern, that this code would apply to the ceded strip and the reservation property.

Q And what was Westmoreland's response after the Tribe adopted their '76 tax ordinance, what was Westmoreland's response to that tax ordinance?

A We filed a lengthy statement and legal memorandum [p. 198] with the Department of Interior, opposing a taxation of coal on the ceded strip.

Q Would you please refer to Exhibits 536, 537, and 538, and identify those documents?

A 536 is a statement of Westmoreland Resources, which we filed with the Department of Interior.

Exhibit 537 is a memorandum of law and support of a statement of Westmoreland Resources.

Exhibit 538 is a supplement to our statement, and memorandum of Westmoreland Resources.

Q Let me briefly ask you your understanding of Westmoreland's position with regard to the tax ordinance and the ceded strip.

First of all, with regard to the ceded strip, when Westmoreland acquired their prospecting permits, or bid on this property, what was your understanding of how the ceded strip was described in that advertisement?

A In the advertisement those prospecting permits in the ceded strip were advertised as being outside the boundaries of the reservation.

Q And in 1976, what was your understanding of who exercised primary civil jurisdiction on the ceded area?

A It was Westmoreland Resources' understanding that the State exercised jurisdiction in the ceded strip.

They maintained the roads. If any police or fire [p. 199] protection, came from the State, or local governments.

Q And what was your understanding, in 1976, regarding the extent of tribal jurisdiction on the ceded strip that was permissible under the Tribe's constitution?

MR. PELCYGER: I object to that as being irrelevant to any matter currently at issue in this case.

We dealt with the jurisdictional issues before, and to the extent this goes to the validity of the State tax, that's already been decided. I don't think it has any relevance to the current proceeding.

THE COURT: Overruled. Go ahead.

THE WITNESS: Would you repeat the question, please?

Q (By Mr. Ross:) What was your understanding, or Westmoreland's understanding, in 1976, regarding the extent of tribal jurisdiction that was allowed under their Constitution on the ceded area?

A Well, I think our position – our position was the Tribe's Constitution didn't allow taxation on the ceded strip, and, therefore, we felt that the Tribe did not have the right to tax our operations in the ceded strip.

Q Did you, therefore, believe that the Tribe would have to amend its constitution before it could exercise taxing authority on the ceded area?

A At the very least they would have to amend the [p. 200] constitution, and get the tax ordinance approved by the Department of Interior.

Q Between 1976 and 1982 did you try to stay informed regarding those two conditions, that is, whether the Tribe's constitution had been amended, and whether the Secretary had approved the Tribe's tax ordinance on the ceded area?

A As best we could, we tried to, yes.

Q And would you please refer to Defendants' Exhibit 535 and identify Exhibit 535?

A Exhibit 535 is a letter from the Department of Interior to Patrick Stands Over Bull, concerning the Tribe's tax ordinance, which had been submitted to the Department of Interior for approval.

This was a preliminary position of the department, and it says that the taxation code presents, once, again, the issue of jurisdiction over non-Indians.

I believe it says, there is no question but what the Tribe has a right to tax on the reservation, but there is some question as to whether the Tribe has the right to tax on the ceded strip.

Q And that was consistent with your position, that there was some question whether they could tax on the ceded strip?

A Yes.

[p. 201] Q Would you please refer to Defendants' Exhibit 539 and identify that document?

A This is a legal memorandum from the solicitor from the Department of Interior to the Secretary of Interior, it is dated October 13, 1976, and it concerns tribal jurisdiction over non-Indians in civil matters, primarily concerning Crow and Shoshone, banning tribal ordinances.

Q Were you aware of that memorandum?

A Yes.

Q Would you please refer to Exhibit 542 and identify and describe that exhibit?

A 542?

Q Yes.

A This is a memo from me to the partners, and I guess maybe I need to explain partners.

At that time we were a partnership, and each partner had a representative on Westmoreland Resources' operating committee, so memorandums were normally just addressed to the partners.

This memorandum encloses a memo, or memorandum from Jim Cannon, area director of the BIA, and Mr. Cannon is recommending that the Secretary not approve the tribal resolution, which was passed, I believe, at the January – tribal resolution passed in January of 1978, amending the [p. 202] constitution to provide for taxation on the reservation.

Mr. Cannon is recommending that the resolution not be approved because the Tribe did not meet the 30-day notice requirement for Constitutional amendments, and he's asking, or urging, that the Secretary make an immediate decision, so that this resolution could be put on the April council meeting.

Q So you were aware in 1978 that there were still questions, or the constitution had still not been properly amended?

A Yes.

Q Would you please refer to Defendants' Exhibit 543 and identify that exhibit?

A This is a letter from the area Director of the Bureau of Indian Affairs to Westmoreland Resources.

I don't see a date on it, but there is a received stamp of March, maybe 29th, 1978, and this letter is responding to a letter that I wrote on February 22nd, 1978, inquiring as to what action interior had taken on the resolution.

And this letter advises that the amendment to their constitution to provide for taxation over the ceded strip was denied by the Secretary of Indian Affairs on March 3rd, 1978.

Q And would you please refer to Exhibit 544 and [p. 203] identify that exhibit?

A This is a memo from me to the partners, dated April 11, 1978, and it advises that at the April 8, 1978, tribal council meeting, the meeting adjourned before they got to the resolution on amending the constitution.

Q Would you please refer to Exhibit 546 and identify that exhibit?

A This is a letter dated January 29th from me to –

THE COURT: That would be –

THE WITNESS: '82, excuse me. To R.M. Gregory, with Wisconsin Power & Light. I wrote the letter.

And the letter brings Wisconsin Power & Light up to date on the taxation issues in the ceded strip, and I point out it's important to recognize at this time that the Crow Tribe's severance tax is not effective on the ceded strip.

And then I go on to say in a later paragraph, since the tax ordinance is not effective for the ceded strip, we do not see any possibility of a retroactive application of the tax. And goes on to say that we are trying to schedule

a meeting between the Tribe, the Attorney General for Montana, and Westmoreland Resources to discuss a sharing of the tax.

Q (By Mr. Ross:) So, Mr. Presley, as late as January 29, 1982, was it your understanding that the Tribe's [p. 204] constitution had never been properly amended to extend taxing jurisdiction to the ceded area?

A January of '82, you said?

Q Yes.

A That was my understanding.

Q And was it also your understanding as of January, 1982, that the Tribe's tax ordinance had never been approved by the Secretary of the Interior as to apply to the ceded area?

A As of January '82?

Q Correct.

A Yes.

Q And under those circumstances, would Westmoreland have paid the Tribe a tax during that 1975 to January 1982 time period, in the absence of Secretary approval?

A No, it would have – there would have to be a valid, existing tax ordinance for us to be able to pass it through to our utility customers.

Q And is your testimony the same even if the Montana tax did not exist?

A Yes.

Q Did the Tribe ever attempt to enforce or collect any taxes from Westmoreland under its 1976 tax ordinance between the 1975 and 1982 time period?

A No.

[p. 205] Q A few moments ago you started to tell us what happened in 1982. I believe you indicated that the Tribe and Westmoreland entered into an agreement in 1982; is that correct?

A Yes, an amendment to the coal lease.

Q Would you please refer to Defendants' Exhibit 550 and describe that exhibit.

THE COURT: What number?

MR. ROSS: 550.

THE COURT: 550?

MR. ROSS: 550.

THE WITNESS: 550 is an amendment to the amended coal mining lease for Tract 3. I signed it on June 18, 1982. The document has a date of July 10th.

This agreement was our mechanism for protecting us from double taxation. That was our understanding, and I think that's what the language of the document says.

Q (By Mr. Ross:) Was it your understanding when you signed that June, 1982, agreement, that the Tribe did not have at that time a valid tax ordinance as to the ceded area?

A It was our understanding that they did not.

However, our attorney was very insistent, as soon as possible after this document was signed, the Tribe would proceed to amend their constitution so that we would have a [p. 206] valid, existing tax, which then would allow us to pass the tax on to our utility customers.

This amendment provides that we will pay the Tribe a tax, a severance and gross proceeds tax equal to the then state tax, less any tax that we had to pay to the State. So we felt that this agreement protected us from double taxation.

Q And was it your understanding that that agreement to pay a tax would apply from the date of that agreement forward?

A We felt that this ordinance gave us a release from any obligation we had in the past, and limited the obligation we would have to the Tribe only to the extent in the future to the severance and gross proceeds tax.

The agreement also provided that the Tribe would not levy any other taxes on us or any other assessments other than the severance and gross proceeds tax.

Q Was it your understanding that under that 1982 agreement, the Tribe released Westmoreland from any tax liability for the 1975 to 1982 time period?

A Yes.

Q I want to ask you now a few questions about Westmoreland's coal market. Would you please describe for us the geographic area of Westmoreland's coal market and the nature of its customers?

[p. 207] A Well, because of the location of our mine, the rail spur leaving our mine goes to Hysham, so our coal has to go east from Hysham to the Upper Midwest, that would be North Dakota, South Dakota, Minnesota, Lake Superior, into the Upper Midwest coal markets.

If we went west from Hysham down to Billings, and then doubled back down to Sheridan and down into the Wyoming coal fields, we would have a 260 to 300 mile rail freight disadvantage, and so basically we have the rail freight advantage over Wyoming going to the Upper Midwest. So that was our niche that enabled us to compete in the markets, Upper Midwest.

Q Can you identify any particular contracts which Westmoreland lost, due specifically to the existence of the Montana severance or gross proceeds tax?

A Not specifically to just the tax. There were a number of factors.

Q And can you identify the exercise of any particular take or pay exercise, due specifically to the existence of the Montana severance or gross proceeds tax?

A Well, beginning in the early '80's, maybe possibly late '80's, some of our original customers opted to pay what we call a take or pay under our contracts, rather than take the coal.

A take or pay payment is the sales price, less [p. 208] any expenses you don't incur as a result of not shipping the coal. So for whatever reason, whether they didn't need the coal, or whether they could buy it cheaper on take or pay, some of our customers opted to go the take or pay route. I'm sure the severance tax had some effect on that, but I'm sure that wasn't the only thing.

I guess to answer your question, I can't specifically identify any take or pay customer which was exclusively the result of the severance tax.

Q In fact, there are quite a few factors, are there not, which affect utilities decision whether to purchase or take coal?

A Yes.

Q For example, demand would be one factor?

A Demand, demand for their power, certainly. Other alternatives, oil, gas.

Q How about reliability of the coal source?

A Yes, that could enter into . . .

Q Transportation?

A Right.

* * *

[p. 213] CROSS-EXAMINATION

Q (By Mr. Pelcyger:) Good morning. Mr. Presley, did you prior to your testimony here this morning have an opportunity to review your previous testimony in the 1984 trial?

A 1984 trial?

Q Yes.

A No.

Q Okay. What would have happened, in your opinion, if the Crow Tribe had sought to collect its 25 percent coal tax while Westmoreland was paying the state taxes to the [p. 214] State and the county?

A Well, we would have been put on the horns of a dilemma, I believe. Two different jurisdictions looking for taxes, it's hard for me to speculate on what we would do, but I'm sure that we would probably go to court, if you want me to speculate.

Q No, I didn't ask you what you –

A Go to court and ask some court to tell us what to do until the issue was resolved.

Q I was not asking you to speculate. I mean, financially, what would have been the impact economically on Westmoreland and on your coal operations?

MR. ROSS: I'm going to object. It assumes facts that are not in the record. It calls for speculation.

THE COURT: Overruled. You are asking him if he would have to pay coal severance and gross proceeds twice?

MR. PELCYGER: Right.

THE COURT: It – how it would affect the competitive market?

MR. PELCYGER: How it would affect the competitive market and how it would have affected Westmoreland.

THE WITNESS: Well, I suppose our first effort would be to try to get the utility customers to pay the extra tax.

[p. 215] Q (By Mr. Pelcyger:) No, no, I haven't asked you that.

A You want to know the economic effects?

Q What it would have done, in your opinion, to the mine and to your – and to Westmoreland's financial and economic position?

A Well, I think that's what I'm trying to say.

Q Okay, I'm sorry.

A Our first effort would probably be to – try to get our utility customers to pay two taxes. And if we were unsuccessful there, it's my opinion the mine would have shut down, period, because our profits from that mine were not sufficient enough to pay two taxes.

Q And based on your familiarity with your utility customers, what would have been their reaction to having to pay two taxes?

A It would have been negative.

Q Would they have done everything in their power to prevent that from happening?

A They would, like us, would do everything we could to keep from paying double taxes.

Q Now, I want to read to you from your previous testimony in Volume II of the trial, page 259, you were – I asked you at that time what, in your opinion, would have

been the effects of double taxation, and your answer was, [p. 216] catastrophic. It is my opinion we would not have shipped any coal as long as we were subject to two taxes. Does that remain your opinion today?

A Like I mentioned, we had two options, and probably the second one would be the more likely one, and that would be catastrophic, yes.

Q Catastrophic to Westmoreland?

A Devastating.

Q Catastrophic to the Crow Tribe?

A I don't know.

Q Well, do you believe the Crow Tribe has benefited from Westmoreland's operation?

A Yes.

Q Substantially?

A Yes.

Q And those benefits wouldn't be received if the mine shut down, would they?

A No.

Q Now, did you make those views about the impacts of double taxation to the Crow tribe?

A I don't know that we did. I don't know that the Crow Tribe ever sent us a copy of their tax ordinance, and I'm not sure that we even communicated with the Crow Tribe, but we certainly did with the Department of Interior after the ordinance was passed.

[p. 217] Q You made it known to the Bureau of Indian Affairs that you felt that the effects of double taxation would be catastrophic, as you state?

A It would not be in the best interest of the Tribe or Westmoreland Resources. That was one of the positions we took in our statement, as I recall.

Q Now, I want to read to you from your deposition of July 21, 1993.

Question: Do you recall whether at any time prior to the July 1982 lease amendment the Crow Tribe, or any representative of the Crow Tribe, had asserted that Westmoreland was required to pay taxes under the Crow Tribe's 1976 tax ordinance even though the Interior Department had concluded that the ordinance could not be applied to the ceded strip?

Answer: I believe there was a meeting between Westmoreland and Tribal members in '76 where they demanded we pay a tax, as I recall. We rejected it, said it wasn't in the best interest of the Tribe. And nothing further happens.

So do you recall that testimony? That was on page 43 of your deposition?

A Yes, I remember it, and I think – I know it was before the Secretary disapproved the ordinance on the ceded strip.

[p. 218] Q My question was not time related. It was just whether you had advised the Tribe that in your opinion the double taxation would not be in the Tribe's best interest because the mine would have to shut down in all probability?

A Well, I think at that same time this meeting occurred, we also told the Tribe that we had given them all the economic benefits we could afford to when we amended the leases in 1974, and that we had nothing further to give.

Q I understand that was Westmoreland's position. I just wanted to clarify that your belief, which you communicated to the Tribe, that it would not be in the Tribe's interest for Westmoreland to be required to pay a double tax.

A That's correct.

Q And during this entire period, Westmoreland was doing everything it possibly could to avoid having to pay a double tax, isn't that right?

A Yes.

Q And Westmoreland also took the position that Montana's tax was invalid as applied to Crow Coal, too; isn't that right?

A Yes, there was a suit that the utilities filed and the producers joined, challenging the State's tax, yes.

Q And also in this case, Westmoreland took the position Montana's tax was invalid as applied to Crow Coal;

[p. 219] isn't that right?

A I – I don't know that we took that specific position. I do know that we intervened, cross claimed, counterclaimed, and probably tried to posture ourselves on every side of the issue to protect Westmoreland Resources and its customers.

Q Well, isn't it accurate to describe Westmoreland's position throughout this period that you were willing to pay one tax or the other, but not both?

A I guess our position was that we would pay one valid tax, but not two.

Q And it really didn't matter to you to whom that tax was paid?

A Yes, that's correct.

Q Now, isn't it also true that early on in 19 – as early as 1976, Westmoreland indicated that it would be willing to pass on to the Tribe any amounts of money by which the State taxes could be reduced by whatever governmental authority, or other rights or powers the Tribe was found to have?

A I believe in '76 we said, if some way the Tribe's tax could be reduced –

Q The Tribe's tax?

A Excuse me, the State tax could be reduced, and the Tribe had had a valid tax in place, that we would [p. 220] certainly consider sharing. I believe there's a '76 letter to that effect, probably February or March.

Q Yes. May I approach the witness, Your Honor?

THE COURT: H-m h-m-m.

Q (By Mr. Pelcyger:) I have just given the witness a copy of Exhibit 346. Is that the letter to which you have referenced?

A Yes, this is a letter to Patrick Stands Over Bull, dated March 30, 1976, from Charles Brinely, President of Westmoreland Resources.

THE COURT: Is that an exhibit other than attached to the statement there? What's the number on it?

MR. PELCYGER: 346.

Q (By Mr. Pelcyger:) Is that right?

A 346.

THE COURT: 346?

Q (By Mr. Pelcyger:) Yes, I think – what were you saying about that exhibit?

A This exhibit, I described it – it's a letter to Pat Stands Over Bull, dated March 30, 1976, and it is written by Charles Brinely, President of Westmoreland Resources, and this letter responds to a meeting we had, an earlier meeting we had with the Tribe, where the Tribe asked us to respond in writing.

And in that meeting, the Tribe, in '76, demanded [p. 221] that we submit – submitted a letter to us demanding that we pay the Tribe's tax. This letter is responding to that demand. The letter says that the – in the amended lease that we negotiated, we gave the Tribe all the financial benefits that we could afford in those '74 amended leases, and the last paragraph on the first page, it says, Westmoreland Resources stands ready to work with you – I will read the whole paragraph.

We suggest, however, that the Crow Tribe consider reinstituting efforts with the Montana legislature to again

an appropriate share of the current Montana tax. Westmoreland Resources stands ready to work with you in this regard, provided that there would be no increase in the overall tax, and provided that the full cost of any proposed arrangement could be passed along to Westmoreland's customers and be able to pass that cost along – I'm editorializing – we would have to have a valid tax from the Crow Tribe.

Q Yes, but what I was referring to in my question, Mr. Presley, was the second paragraph of the letter, which refers to the negotiations that took place which resulted in the amended lease in 1974, in which Mr. Brinely states, that during the course of those negotiations the Westmoreland representatives did express a willingness to pass on to the Tribe any amounts – to pass on to the Tribe – not to share [p. 222] with the Tribe – but to pass on to the Tribe any amounts by which the burden of the expected state tax could be reduced by the exercise of whatever governmental powers the Tribe may have over the ceded strip.

Now, is that your understanding of Westmoreland's position?

A That's correct, and I assume the governmental powers would be a valid tax.

Q Well, isn't that in fact the same position that Westmoreland took during those negotiations in 1974 as reflected in this letter of March 30, 1976? Isn't that in fact the position that was incorporated into the 1982 tax amendment?

A Yes. Yes, we indicated a willingness to work with the Tribe, and if the state tax were reduced by the legislature, or some other manner, we agreed if they had a valid tax, if we could pass on to our customers, we could do that.

Q And you agreed that you would be willing to pay the Tribe the full amount of the state tax as long as you didn't have to pay the State that tax; is that right?

A I don't think this letter says that.

Q Well, that's what you agreed to in 1982, didn't you?

A Yes. [p. 223]

Q And, in fact, you have passed on to your customers the taxes due under that 1982 tax ordinance, haven't you?

A Yes.

Q And isn't it also true, as I think you stated earlier this morning, that as long as Westmoreland was required to pay the state taxes, that Westmoreland felt that it had nothing more economically that it could give the Crow Tribe?

A That's true.

* * *

[p. 235] REDIRECT EXAMINATION

Q (By Mr. Ross:) During Mr. Pelcyger's cross-examination, I think he asked you if Westmoreland would be willing to pay one tax, but not both.

But even if there had been no Montana tax, would Westmoreland have paid the Tribe that tax if the Tribe didn't have what Westmoreland thought was a properly approved tax by the Secretary of the Interior?

A No, we wouldn't, because we couldn't pass it on [p. 236] to our customers.

Q Referring to Exhibit 346, that indicates, does it not, that Westmoreland – do you have Exhibit 346?

A I don't have – well, let's see, maybe I do. Maybe I've gotten them mixed up here.

Q Is it your understanding that that letter – essentially Westmoreland offered to work with the Tribe in approaching the Montana legislature to see if there could be a reduction in the state tax? Is that generally your understanding?

A That's correct.

Q Did the Tribe take Westmoreland up on that offer to approach the Montana legislature to try to reduce the Montana tax, or to share it with the Tribe, after this letter came out in 1976? Did they ever take you up on that offer and say, yes, let's go, and actually go with you to the legislature?

A I don't know whether it was immediately after this letter, but I think at some time or other the Tribe's attorneys, George Miller, our attorney, met with Mike Greely, the Attorney General, that's my recollection at some time, but I can't tell you when, to discuss a resolution of the tax issue.

Q But you don't know whether the Tribe ever took them up on their offer and actually went to the Montana [p. 237] legislature?

A I don't have any knowledge that the Tribe ever went to the legislature and lobbied for a sharing of the tax.

Q Did the Tribe ever approach Westmoreland in 1988 and offer to reduce their tax to Westmoreland?

A No.

* * *

CROW TRIBE CONTRIBUTIONS TO THE MONTANA ECONOMY

	Total Crow Indian Income on the Crow Reservation	Crow Expenditures of Funds Held in Trust by the Bureau of Indian Affairs	Expenditures by Indian Health Services at Crow Agency	Expenditures by Bureau of Indian Affairs at Crow Agency	Other Federal Government Expenditures on the Crow	Total Expenditures Attributed to the Crow	Employment Multiplier	Employment Generated From Expenditures Attributed to the Crow Tribe
						(1)+(2)+(3) +(4)+(5)		[(6)÷1,000,000)] x 20.4
	(1)	(2)	(3)	(4)	(5)	(6)	(7)	(8)
1975	$5,924,063	$2,000,282	N/A	N/A	$2,109,338	$10,033,683	20.4	205
1976	6,425,065	958,165	N/A	4,326,850	1,929,338	13,639,419	20.4	278
1977	7,012,899	N/A	N/A	4,877,946	1,996,538	13,887,383	20.4	283
1978	7,728,173	N/A	N/A	5,686,840	2,010,202	15,425,215	20.4	315
1979	8,809,002	2,650,714	N/A	5,610,838	5,878,407	22,948,961	20.4	468
1980	10,229,298	8,341,493	N/A	6,064,564	4,664,167	29,299,523	20.4	598
1981	11,471,128	2,576,781	$4,166,247	6,002,456	4,174,472	28,391,085	20.4	579
1982	12,375,941	4,010,021	4,581,442	8,145,674	3,199,859	32,312,938	20.4	659
1983	12,977,996	6,850,460	5,887,828	7,681,477	3,881,773	37,279,534	20.4	761
1984	13,751,604	3,175,387	5,976,062	8,046,608	6,207,903	37,157,564	20.4	758
1985	14,462,224	3,024,823	6,317,665	7,610,485	2,597,021	34,012,219	20.4	694
1986	14,952,305	2,243,453	6,078,627	9,434,420	4,864,126	37,572,931	20.4	766
1987	15,731,237	1,256,143	6,748,031	7,747,260	2,733,109	34,215,781	20.4	698
1988	16,624,967	1,399,676	7,065,059	12,020,813	2,344,922	39,455,437	20.4	805
1989	17,680,581	4,526,438	9,290,901	9,209,862	2,279,544	42,987,327	20.4	877
1990	18,904,238	8,269,120	9,750,611	9,316,847	2,233,730	48,474,547	20.4	989
1991	19,979,377	11,402,527	11,173,648	9,312,624	2,293,385	54,161,560	20.4	1.105
1992	20,868,857	12,146,107	10,213,757	8,678,602	2,333,613	54,240,936	20.4	1.107
1993	21,794,404	11,385,837	11,361,286	8,862,400	2,337,665	55,741,592	20.4	1.137
Total	$257,703,359	$86,217,429	$98,611,164	$138,636,566	$60,069,117	$641,237,635		
New Hospital Construction 1						$13,835,671	20.4	282
Equipment for Hospital 1						$3,300,000	20.4	67

Sources and Notes

N/A indicates data not available.

Column (1): Based on the 1989 per capita income for American Indian, Eskimo or Aleut living on the Crow reservation as reported in the 1990 Census of Population and Housing, Tape File 3A.

Column (2): Taken from Bureau of Indian Affairs, Summary of Trust Fund Reports, 1975-1993.

Column (3): Obtained from Indian Health Services, Crow Service Unit.

Column (4): Taken from Bureau of Indian Affairs budget reports for Crow Agency.

Column (5): Grants and contracts from Federal agencies including the following: Department of Housing and Urban Development, Department of Energy, Department of Labor, Department of Health and Human Services, Office of Surface Mining, Department of the Treasury, Environmental Protection Agency, Department of Commerce, Economic Development Agency, Bureau of Reclamation. These figures were obtained from the Crow Tribal Council and Crow budget resolutions.

Column (7): The multiplier is taken from U.S. Department of Commerce, Bureau of Economic analysis, *Regional Multipliers: A User Handbook for the Regional Input-Output Modeling System (RIMS II)*, Second edition, Washington, DC: U.S. Government Printing Office, May 1992. Note that the multiplier applied is for households. This is very conservative and was applied to offset possible double-counting among the expenditure sources.

[1] These expenditure figures were obtained in October 1993 and, therefore, may be understated.

Table R-16

STUDIES REPORT THAT INDIAN RESERVATIONS HAVE SUBSTANTIAL ECONOMIC BENEFITS

Study	Comments
"The Economic and Fiscal Importance of Indian Tribes in Arizona," prepared by The Center for Applied Research, for The Arizona Commission of Indian Affairs, January 1993	State-wide income attributable to Arizona's Indian population is estimated to be \$829.0 million annually, and the state expends only \$21.9 million on behalf of the Indian population per year. State-wide tax revenue attributable to Indian consumer expenditures and enterprises is \$93.0 million annually. Total off-reservation consumption by Arizona's Indian population is approximately \$208.0 million annually.
"Flow of Funds on the Yankton Sioux Indian Reservation," prepared by Dr. Calvin A. Kent and Dr. Jerry W. Johnson, for the Ninth District Federal Reserve Bank, June 1976	From information received through an expenditure survey of tribal members, it was estimated that Yankton Sioux people spent over \$2.2 million. The survey yielded a multiplier of 3.88, implying that an additional \$8.6 million in expenditures was induced by the original \$2.2 million spending by the Sioux.

The federal government spent over $3 million directly on the Sioux and an additional $1 million indirectly through state programs where federal dollars were passed through state agencies to Sioux beneficiaries.

The state of South Dakota spent only $335,477 of its own money on programs directly benefitting Indian people living on or near the reservation.

Approximately 97% of total expenditures by the Yankton Sioux people remained within the state of South Dakota.

"A regional Economic Analysis of the Turtle Mountain Indian Reservation: Determining Potential for Commercial Development," prepared by James M. Murray, University of Wisconsin-Green Bay, and James J. Harris, University of North Dakota, for the Federal Reserve Bank of Minneapolis, 1978

40% of Rolette County's (North Dakota) employment can be directly and indirectly attributed to the Turtle Mountain Chippewa Tribe.

"The reservation and its economic activities are very important to the economic base of all of Rolette County."

"The economy of the reservation is closely integrated with that of the surrounding trade centers and should not be treated as a separate entity."

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
BILLINGS DIVISION

THE CROW TRIBE OF INDIANS, Plaintiff,	)	No. CV-78-110-BLG-JDS
and	)	
UNITED STATES OF AMERICA, Plaintiff-Intervenor,	)	Volume V
vs.	)	
STATE OF MONTANA; MICHAEL J. ROBINSON, Director, Montana Department of Revenue; BIG HORN COUNTY, Montana; MARTHA FLETCHER, Treasurer, Big Horn County, Montana, Defendants.	)	

TRANSCRIPT OF PROCEEDINGS

Trial in the above-entitled matter resumed for trial in open court before the HONORABLE JACK D. SHANSTROM, United States District Judge, on May 3, 1994.

APPEARANCES

For the Plaintiffs:
MR. ROBERT S. PELCYGER
MR. WILLIAM HUGENBERG, JR.,
MR. MICHAEL AUSTIN
Fredericks, Pelcyger, Hester & White
1881 9th Street, Suite 216
Boulder, CO 80302

RICHARD L. MATTSON
Official Court Reporter
United States District Court
316 N. 26th St., Rm. 5405
Billings, MT 59101
(406) 259-1705

* * *

[p. 838] Q [By Robert S. Pelcyger] I would then like to turn your attention to Table R-15. Before getting to anything specific, I would you [sic] like to ask you what led you to obtain the information that is set forth in that table?

MR. SMITH: Your Honor, let me object to any questions concerning Tables R-15 and R-16. And this objection relates to the issues I raised at the conclusion of our case in chief.

[p. 839] Putting aside the accuracy or validity of the rationale behind the tables and figures to which the witness has testified to so far, these fall outside the scope, the appropriate scope, of rebuttal. None of the testimony adduced during the State's case in chief by its witnesses related to this subject matter. Indeed, counsel for the Tribe questioned both Mr. Kerins and Mr. Davis about

whether they considered these kinds of issues in their study, and they said no.

We would suggest to the court that this is the kind of evidence, that were it to have been presented, should have been presented during the Tribe and the United States' case in chief, but was not. As I said before, I prepared a short brief on this issue. I am prepared to tender it to the court and to opposing counsel at this point.

THE COURT: You can give me the brief. I guess my ruling will be that I will take it under advisement and go ahead.

MR. PELCYGER: May I briefly explain why I think it is proper rebuttal testimony?

THE COURT: Yes.

MR. PELCYGER: Your Honor, I agree with Mr. Smith's characterization, that is, that his witnesses did not undertake this specific kind of analysis, but the whole [p. 840] point of their testimony, to which I would add we objected, and which we had previously objected though our motion in limine, was to seek to offset any award to the Crow Tribe by the amount of –

THE COURT: And I allowed in Scenario 1, 2, and 3, on the reservation, on the reservation, Big Horn County, and then the state-wide.

MR. PELCYGER: Right. And this Table R-15 goes to the overall equities of the situation in terms of what did the Crow Tribe contribute to the State and to Big Horn County and is directly responsive to their testimony.

Again, the reason it wasn't part of our case in chief is we sought, as you recall, to – we claimed that the whole issue was irrelevant, that the expenditures, any expenditures to be properly offset, should be related to the Absaloka mine, but the court allowed the testimony, and this is responsive to that.

THE COURT: I will – again, I will take the motion under advisement, but go ahead.

Q (By Mr. Pelcyger:) I think the question pending, Dr. Berkman, was before addressing this specific information in Table R-15, ask you to describe what led you to seek that kind of information and the purpose of the information that's provided.

A [By Mark P. Berkman] Yes. Well, it struck me during – in reading the [p. 841] Galusha reports initially, and listening to testimony, that there are other ways of looking at the costs and benefits of the Crow Reservation being located within the State of Montana.

And that if you were really addressing questions of whether or not the Tribe and the reservation were a net burden or gain to the State, you would have to look beyond the simple accounting structure, either the one that was initially done by the Galusha firm, or even the corrections that we've made that we reviewed here today. It's a much broader and more complex question to determine whether or not the reservation is an asset or a problem for the – a burden, rather, to the State.

So I undertook some preliminary work to investigate what we can say about that question.

Q And with that background, what did – what information did you seek, and how was that portrayed on Table R-15?

A Well, R-15 is my presentation of a fairly standard form of impact analysis. It's commonly done, for example, when government analysts, or policy analysts, or anyone else for city or regional planners are trying to estimate the impact of, say, a new power plant or a new military installation, or the closing of a military installation, or any other major economic activity.

[p. 842] We want to see what it does to the local economy. And by what it does, I mean we want to see what it does in terms of generating income and earnings and employment and output to the local or state economy.

And so, in order to do that here, we treated the reservation like we would treat any other government installation, say a military base. And the first step in doing that kind of analysis is identifying the amount of money that's being invested, or spent, by and for the reservation.

So we undertook to identify the level of those funds being spent by contacting the BIA, by talking to Crow budget officials, by going to other federal agencies that provide services directly to the reservation, including the IHS, and Department of Interior, Office of Surface Mining, and several others, and there we were able to identify the amount of money that was in fact being spent each year, '75 through '93, on the reservation.

I want to be somewhat cautious here, it's difficult to come up with these numbers. They are not consistently reported. There is no single source document to go to. So that you will see in fact that there are NA's in a number of places where we just couldn't identify any numbers at all. But even in those years where we do have numbers, it is quite possible that we've missed some.

[p. 843] And I should also add that it is also possible there could be some double-counting in here. It is very hard to make that distinction, and we tried to be careful about that, but it is quite possible that there remain some double-counting. But while there is possibility for double-counting, there are also omissions. So it is hard to say under further research the number would go up or down.

In any event, once we have identified that flow of funds, we then sum those up, and those are what you see in Column 6 of this table. So that over the period '75 to '93, we determined that over $640 million dollars had been spent on providing programs and services and jobs to members of the Crow Tribe, which is certainly a sizable amount of money.

In addition to that, we noted that there is a new hospital under construction being scheduled for completion within the next year, and that generated an additional amount of money, a new investment and construction of almost $14 million and then additional $3.3 million for equipment purchases for that hospital.

So we then decided that at least to give some sense of magnitude to these kinds of numbers, we would also look at one of the standard impacts that's measured when looking at the contribution of, say, a federal installation,

or a powerplant, and that is how many jobs are generated by [p. 844] this additional spending. And to do that, we often rely on what's called an employment multiplier. That's what is shown in Column 7.

An employment multiplier represents for every additional million dollars spent, how many additional jobs are generated in the economy. That is, that money is then paid to local workers, they, in turn, buy goods and services with that money, which yet generate another round of jobs. And in this particular kind of multiplier, which is developed from an input-output model developed by the Department of Commerce called the Rims multiplier, it includes what they refer to as both direct, indirect, and induced impact. So we are getting a first and second round effect of jobs, as well as a third round induced by the spending of the first two.

I have chosen in Column 7 a very conservative multiplier. It's the multiplier that represents household spending. Ordinarily, the more precise way to make these estimates is to assign a multiplier that's quite specific to the kind of spending going on. So, for example, if we are spending money on construction, there would be a multiplier for construction workers. If we are spending money on health care services, there would be a multiplier for health care.

But because of some of the uncertainties in some [p. 845] of these numbers, and because in fact there is a chance for some double-counting, I thought I would be conservative as a first cut to use the low end of the multipliers I could find. I should also add that this multiplier is specific to Montana. The Rims system, or model I

mentioned a minute ago, is developed and produced at the state level, and for most counties can also be obtained. So it is specific to that extent.

It does have, probably because it is part of an input-output model, have some infirmities associated with it. One of which is that it oftentimes doesn't accurately account for the fact that some of the spending that will take place, in fact large parts of it for certain categories, will clearly flow not only outside the reservation, but outside the state. For example, hospital equipment is – much of it may not be manufactured in the State of Montana. Although, it may be then bought from local distributors in the state, so they would share in the overall spending on that piece of equipment.

But what is also I think important to recognize in this particular instance, we are looking at spending on the Crow Reservation. There are very few opportunities to spend money on the Crow Reservation. There is more now than there used to be. I visited the new casino, but even taking that into account, and assuming your luck isn't particularly [p. 846] good, there is still not a great deal of spending on the reservation. People on the reservation travel outside the boundaries of the reservation to spend their money, and many of the service providers on the reservation live off the reservation. So that it's quite likely a good portion of this does benefit the surrounding communities, both in Big Horn County and elsewhere in the state, and that should be recognized.

Finally, after all that, Column 8 is then simply taking that employment multiplier, times the expenditure level, and so you can see that based on the spending level, for

example, in 1975, of just over 10 million dollars, that using that multiplier we estimate that 205 jobs were generated. And you can see that number moves around over time, depending on how much we identify as being spent. And by 1993 as spending increased, as the Crow budget grew, partly through the results of the collecting a severance tax, we see more spending, and in fact more jobs being created. Which clearly benefit both the Crow and residents of the surrounding localities in the state.

Q Now, are those – Column 8, does that represent – where are those additional jobs located?

A Well, again, most of these jobs would be located, at least the secondary and induced jobs, would be located off the reservation. Again, there is very little economic [p. 847] activity on the reservation for people to spend their money on. So that the monies and the jobs, as a result, flow off the reservation.

Q And is this, in general, supposed to represent the jobs throughout the state then?

A Yes, again, this is a state level multiplier. So it would estimate jobs regardless of location within the state. We can't pinpoint where they would happen.

Q Would your opinion be that most of them are likely to be closer to the reservation?

A That's really actually hard to say. I mean, to the extent that the spending patterns are typically on basic commodities, yes. But to the extent that we are talking about payment for certain kinds of equipment, like hospitals, that would clearly be further away. But by and large,

spending on basic commodities is clearly going to be quite local.

Q I note a significant increase in Column 2, the Crow expenditures of funds held in trust by the Bureau of Indian Affairs. Do you know what that was attributable to?

A I recall there was one jump, I think that was the year because of emergency services money.

Q I'm talking about Column 2.

A Oh, Column 2.

Q I believe you stated you thought that was [p. 848] attributable to the increased funds resulting from this litigation?

A No, in later years, after 19, say '89, or even 1988, you see a very large increase in those things. That I attribute to the tax. The earlier number, in this column, I believe possibly, was partly a result of this Shell bonus payments made in that year for the Youngs Creek Mine.

Q But the ones since 1989, or 1990, were attributable to the increased income to the tribe resulting from the severance tax?

A Yes.

Q Now, you refer to the hospital. Do you know how much money will be spent for the hospital once it's completed?

A I think the total exceeds 20 million, about $25 million.

Q Are there any other points you would like to make with regard to Table R-15?

A I don't think so.

Q Table R-16, is that the followup to R-15?

A Yes. This table summarizes three studies that I reviewed during the course of my analysis, which address the same kind of question I was attempting to take a first cut cut at. That is, looking at what the economic impacts are of a reservation within a state economy.

[p. 849] The first one listed was done in 1993, looking at the contribution, or the impacts of Indian tribes and reservations in Arizona, for the Arizona Commission of Indian Affairs. And that's the most recent one.

They, as indicated under the comments column, found that the Arizona Indian population generates a substantial amount of income, $829 million on an annual basis, but that the state spends only $29.9 million on behalf of the Indian population per year.

They also generate a statewide tax revenues attributable to Indian consumers and enterprises is $93 million annually, and that total off-reservation consumption by Arizona's Indian population is approximately $208 million dollars annually. Again, the same kind of phenomenon happens on most reservations where there is not a tremendous amount of economic base, or economic activity within the confines of the reservation, so most spending takes place elsewhere.

The next study – these aren't in exactly chronological order – on the list, though, is a study done in – I don't

remember if this was – this was in South Dakota, done in 1976 for the Ninth District Federal Reserve Bank. It, again, showed that the reservation generated substantial income, and that most of that income benefited the economy surrounding the reservation, not necessarily the [p. 850] reservation itself. For example, the final comment here is that 97 percent of total expenditures by the Souix [sic] people were made within the State of South Dakota. Getting back to your question before, the extent that monies are spent on basic commodities, they are more likely to be spent locally.

And finally, the other study also done for the Federal Reserve Bank of Minneapolis looked at the Turtle Mountain Reservation and its impacts on the regional economy. And it found, for example, that in the county that's contiguous with the reservation, that 40 percent of the employment in the county could be either directly or indirectly attributed to the Turtle Mountain Chippewa Tribe. That's a sizable amount. And, again, that the reservation, because of the fact that it relied heavily on surrounding county for the provision of goods and services, made a net contribution to the local economy.

So I take these as additional evidence that you really have to look at that kind of analysis in order to establish whether a particular reservation is a burden or an asset to the state. I think it properly can be viewed much like other installations, even like a military base, which, at times, people in Congress seem very eager to protect and maintain.

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